Petition

81-1317

No.

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In the Supreme Court of the United States

October Term, 1981

CITY OF PARMA, OHIO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Fair Housing Act, 42 U.S.C. §3601 *et seq.*, purport to require municipalities to supply public and low-rent housing to persons of low income, or purport to apply to the enactment and enforcement of building, zoning, and referendum ordinances by municipalities, and if so, is the Act unconstitutional on its face or as so applied for violating principles of federalism, comity, and separation of powers?

2. In the guise of enforcing the Fair Housing Act, do federal courts have authority to intrude massively into the local governmental functions of petitioner municipality by (1) restructuring its government to supplant elected officials with appointed committees answerable to the district court; (2) forcing petitioner to supply public and low-rent housing to persons of low income; (3) invalidating and abridging the people's right to vote in referendums on housing and zoning issues, which right to vote was upheld against constitutional attack by this Court in *James v. Valtierra*, 402 U.S. 137 (1971), and *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976); and (4) abridging ordinances and otherwise requiring petitioner to take actions the district court thinks will dilute the mostly-white complexion of the city?

3. When the Attorney General brings a civil action in the name of the United States against the petitioner municipality under 42 U.S.C. §3613, isn't he subject to the same Article III case or controversy justiciability requirements, a statute of limitations, and the doctrine of *res judicata*, as are all other litigants, especially when he is in privy with plaintiffs in two class-action suits presenting identical jurisdictional, fact, and legal issues which were decided in favor of petitioner?

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No.

In the Supreme Court of the United States

October Term, 1981

CITY OF PARMA, OHIO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner, City of Parma, Ohio, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered on October 14, 1981, upon which petitioner's timely-filed petition for rehearing was denied on December 10, 1981.

OPINIONS BELOW

The opinions of the district court were reported at 494 F. Supp. 1049 (N.D. Ohio 1980) and 504 F. Supp. 913 (N.D. Ohio 1980), and are set forth on pages A40 to A178 of the separately-printed Appendix to this Petition; the decision of the Court of Appeals for the Sixth Circuit was reported at 661 F.2d 562 (6th Cir. 1981) and is printed on

pages A1 to A39 of the Appendix, and the order denying Parma's timely-filed petition for rehearing, together with the dissenting opinion of Judge Paul C. Weick, is printed on pages A212 to A223.

The opinion and orders in the consolidated, companion case of *Cornelius v. City of Parma*, 374 F. Supp. 730 (N.D. Ohio 1974, *vacated and remanded*, 506 F.2d 1400 (6th Cir. 1974), *vacated and remanded*, 422 U.S. 1052 (1975), *remanded for dismissal*, 521 F.2d 1401 (6th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976), are set forth on pages A179 to A210.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on October 14, 1981; petitioner's timely-filed petition for rehearing was denied on December 10, 1981.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The constitutional provisions involved are Article III, Section 2; Article IV, Section 4, and Amendment XV, Section 1. The federal statutes involved are 42 U.S.C. §3601 *et seq.*, the Fair Housing Act. Ordinances involved are 1197.03, 1229.01, 1528.01-1528.03, and 1529.37 of the Codified Ordinances of the City of Parma, Ohio. Because the provisions involved are lengthy, their pertinent texts are set forth in the separately-printed Appendix to this Petition at pages A224 to A237, in accordance with Rule 21.1(f).

STATEMENT OF THE CASE

On November 2, 1971, general election day, the people of Parma, Ohio, passed two ordinances which had been placed on the ballot by initiative petitions circulated in July, 1971, in accordance with the Constitution and statutes of Ohio. One of the ordinances restored the former 35-foot height limitation on all residential buildings. The other was patterned on Article XXXIV of the California Constitution, which six months before had been found constitutional and commendable in *James v. Valtierra,* 402 U.S. 137 (1971). It gives the right to the people of Parma, by way of referendum, to decide whether or not to accept federal aid for low-rent public housing pursuant to the local-consent requirement of federal law, 42 U.S.C. §1437 (e), and whether or not to consent to participation in the former rent supplement program (which is no longer available).

In February, 1971, the Mayor and City Planning Commission sponsored a proposal for senior-citizen housing for Parma residents. Forest City Enterprises, Inc. prepared preliminary site plans for two ten-story, high-rise buildings on its property which had been rezoned in 1969 to allow apartments up to 100 feet in height. There had been citizen opposition to allowing residential buildings over 35 feet in height ever since zoning ordinances were amended in 1963 to provide for high-rises. Two citizen attempts were made to have referendums on the issue, but they failed to reach the ballot for technical reasons.

On July 13, 1971, Forest City presented its senior-citizen housing project, called Parmatown Woods I and II, to the Parma Planning Commission, which is chaired by the Mayor. At that public meeting, the outgoing, lame-

duck president of council, speaking for himself as a private citizen, stated that he did "not want Negroes in the City of Parma", which remark received widespread publicity. The commission unanimously approved the Parmatown Woods proposal at that same meeting. Forest City then submitted an application for a building permit which referred to attached plans for details.

At this same period of time, two other high-rise projects were being built and engendered considerable public controversy. Litigation was instituted over one of them, Regency Towers. Opposition to Parmatown Towers, a privately-financed, F.H.A.-insured, low and moderate-income §221-D-4 project, was based on the fact that when Forest City obtained the rezoning in 1969, it had proposed six-story luxury apartments, which were touted as bringing in substantial tax revenues, but when Forest City obtained the permit for Parmatown Towers, it was for a ten-story building. Since Forest City was within its legal rights to change to the higher density, nonluxury building, nothing could be done about the increased height of Parmatown Towers, which was under construction, or the proposed Parmatown Woods, but the feeling was prevalent among city residents and council members that Forest City had been deceitful in dealing with city officials. Members of homeowner groups circulated the initiative petitions mentioned above to give voters a voice in future zoning decisions.

On November 3, 1971, Parma's building commissioner, acting upon the city engineer's memorandum of October 28, 1971, returned the plans and building-permit application for Parmatown Woods to Forest City Enterprises, since they still did not conform to Parma's codified ordinances after previous notices to that effect had been sent to Forest City and it had failed to seek a variance or submit plans

which did comply. The Mayor has at all times favored Parmatown Woods, provided its plans conform to Parma's ordinances.

Parmatown Woods was to have been subsidized under Section 236 of the National Housing Act, 12 U.S.C. §1715 z-1. Since the application was filed prior to passage of the initiated ordinances, they had no effect on Parmatown Woods. As part of the application process, Forest City filed with the Federal Housing Administration (F.H.A.) an "Affirmative Marketing Plan" wherein it advised the government that the expected tenants would be elderly persons from the ethnic groups who predominate in the area, but it was "not expected that significant impact can be made in attracting minority group tenants with or without outreach." (App. A249 to A251).

Parma's population is in large part made up of descendants of immigrants who, being victims of Nativist prejudice and discriminatory laws such as the "National Origins Quotas" Immigration Acts, clustered in residential neighborhoods of like cultural and religious identity. This ethnic grouping occurred naturally by free choice without any involvement of city officials. There are definite patterns of ethnic migration discernible within Cuyahoga County, known as ethnic corridors or arteries—unidirectional movements away from the center of the city to the outer fringes and then into the suburbs, with corridors commonly following main traffic arteries or roads. As the movements to the suburbs occurred, there were also ethnic clusterings there. The migration of blacks was into contiguous areas on the east side, and there are no contiguous areas moving out through the west side of Cleveland into Parma. These migratory patterns were testified to by Parma's expert at trial and were also described by Harold X. Connolly in his article *Black Movement Into the Suburbs*, in the

URBAN AFFAIRS QUARTERLY, September, 1973, at pages 96-7. These migratory patterns are not confined to the Cleveland area but are found nationwide: THOMAS SOWELL, RACE AND ECONOMICS, 44-5 (New York: McKay, 1975); EDWARD C. BANFIELD, THE UNHEAVENLY CITY, 79-87 (Boston: Little, Brown and Company, 1970). Few nonwhite persons chose to live in the Parma area, and so Forest City advised F.H.A. that it was not expected they would be attracted to the project.

Forest City built the virtually identical subsidized-project, known as Independence Place I and II, a few hundred feet west in the adjacent community of Parma Heights, in conformity with its ordinances, and asked Parma to rezone the abandoned project-site for commercial development.

Forest City has never contested Parma's rejection of its plans for Parmatown Woods and has abandoned that project, having built Independence Place in its stead. In its Memorandum Opinion of February 24, 1974, the district court held "no live controversy presently exists regarding this housing" (App. A189).

As foreseen by Forest City in the identical "Affirmative Marketing Plan" filed with the F.H.A., no nonwhites have moved into Independence Place at any time since the project was completed in 1973, even though they were actively solicited to become tenants.

Alleged Basis for Federal Jurisdiction

It was the passage of the two initiated ordinances and rejection of the plans for Parmatown Woods which triggered this civil action filed by the Attorney General in the name of the United States, under 42 U.S.C. §3613, more than seventeen (17) months later on April 27, 1973 (App. A238

to A241). 42 U.S.C. §3612 provides that a "civil action shall be commenced within one hundred eighty days after the alleged discriminatory housing practice occurred". It was filed about an hour after a class action entitled *Cornelius v. City of Parma* was filed under 42 U.S.C. §3612, and those plaintiffs' motion to consolidate both actions on the basis that identical issues of fact and law existed was granted by the district court.

On February 27, 1974, the district court dismissed the amended complaint in *Cornelius* on threshold Article III jurisdictional grounds and because it was barred by the 180-day statute of limitations (374 F. Supp. 730, App. A179 to A208). It also dismissed the complaint in this action "insofar as it seeks to directly challenge the two Ordinances" (374 F. Supp. at 744-5, App. A206 to A208). Upon appeal, the court of appeals vacated the dismissal, but this Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of *Warth v. Seldin,* 422 U.S. 490 (1975) (App. A209), whereupon after further consideration the court of appeals remanded it for dismissal (App. A210).

While the action at bar was pending in the district court, the first of the three suits attacking Parma's housing and zoning decisions was on appeal. The district court's ruling that Parma (and four other Cleveland suburbs) violated the Fair Housing Act for not providing low-rent public housing, 355 F. Supp. 1267 (N.D. Ohio 1973), was reversed by the court of appeals in *Mahaley v. Cuyahoga Metropolitan Housing Authority,* 500 F.2d 1087 (6th Cir. 1974), *cert. denied,* 419 U.S. 1108 (1975). Parma thereupon amended its responsive pleading to raise the defense of *res judicata* (App. A242 to A248).

Parma's motion for summary judgment was denied four years after it was filed, and at the liability trial, over

objections, the district court permitted the government to raise issues not included in its complaint—which was never amended or supplemented—concerning events occurring after the action was filed. Despite its earlier contrary ruling, the district court also permitted the government to challenge directly the two initiated ordinances passed in 1971.

In 1968, government witness Alan Gressel was the Director of Operation Equality, a county-wide fair housing organization. In July, 1968, he stated that "a proper response has been made toward Negroes by Parma's residents, and we have had no complaint calls from Negroes or white residents in Parma"; that "Operation Equality reports that it has good acceptance of the idea of living in Parma by Negro residents wanting to rent apartments", but that "Negroes have voiced some prejudice against buying homes in Parma, and they have had better luck in Brook Park, where homes are cheaper, and in North Olmsted where more land is available." He also found that it is easier for Negroes to rent apartments in Parma than in some sections in the east end of the county (Liab. Tr. 826-31; Deft.'s Ex. DX). A fair housing resolution proposed in that year by the majority leader of Parma's council, as a political move, was defeated 5-7, for the expressed reason that such a resolution was not needed in Parma.

Parma is predominantly residential in character. It has a wide range in housing from low cost and low rent to moderately high cost and moderately high rent, including houses for sale at prices less than for new homes in the central city of Cleveland. Because of the costs involved, builders today prefer low-rise buildings not higher than three floors, and HUD will not approve family-type public housing projects higher than two and a half stories.

No requests for public or other low-rent housing have been made to public officials in Parma by its residents.

The complaint (App. A238 to A241) did not attack Parma's 2½ parking space per-apartment-unit requirement enacted in 1969. There was expert testimony that adequate off-street parking is important in the planning process to maintain the environment, and requiring more than two parking spaces per apartment unit is essential to provide for two-car husband and wife workers and their guests. It also helps prevent fights over parking spaces.

District Court Rulings

In a 96-page opinion which did not clearly separate findings of facts from conclusions of law but rather merged them into mixed questions, App. A40 to A153, 494 F. Supp. 1049 (N.D. Ohio 1980), the district court held that Parma violated the Fair Housing Act because it (1) did not pass a fair housing resolution in 1968; (2) passed ordinances initiated by the people to restore the former 35-foot height limitation on residential buildings (App. A237) and providing for *Valtierra*-type referendums on public housing projects (App. A235 to A237); (3) rejected plans for Parmatown Woods which did not conform to Parma's code; (4) has not provided public or low-rent housing for persons of low income; (5) did not reapply for Community Development Block Grant funds after HUD rejected Parma's application; (6) passed an initiated ordinance in 1974 providing for referendums on all zoning changes similar to the provision upheld in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (App. A234 to A235), and has had since 1969 a requirement of 2½ parking spaces per unit for apartment houses (App. A233 to A234).

After a remedy trial, the district court issued its remedial order, App. A154 to A178, 504 F. Supp. 913 (N.D.

Ohio 1980). In it, the district court invalidated entirely the ordinance patterned after the California provision upheld and commended in *James v. Valtierra, supra,* providing for a referendum on whether to consent to public housing, and invalidated the 35-foot height limitation, 2½ parking space requirement, and zoning-change referendum provision, similar to that upheld in *City of Eastlake, supra,* insofar as they would apply to any low or moderate-income housing proposals. It also (1) issued a wide-ranging injunction; (2) ordered an educational program, an advertising program, and the passage of a fair housing resolution; (3) ordered the establishment of a "Fair Housing Committee" and an "Evaluation Committee" with specified authority in housing matters supplanting Parma's elected officials; (4) ordered that public housing be constructed in Parma, that Parma apply for Community Development Block Grant funds, participate in the Section 8 housing program, and provide at least 133 units of low and moderate-income housing annually, and (5) appointed a special master with broad powers.

Court of Appeals Decision

On appeal, the court of appeals reversed the order appointing a special master, eliminated the specific figure of 133 units, and modified the scope of the advertising program, but otherwise affirmed the wide-ranging remedial order. Petitioner timely filed a petition for rehearing and suggested an *en banc* rehearing because the court of appeals decision conflicted with prior decisions of that court in *Mahaley v. Cuyahoga Metropolitan Housing Authority, supra,* and *Joseph Skillken & Co. v. City of Toledo,* 528 F.2d 867 (6th Cir. 1975) and 558 F.2d 350 (6th Cir. 1977), *cert. denied,* 434 U.S. 985 (1977), *rehearing denied,* 434 U.S. 1051 (1978). The rehearing *en banc* was denied on December 10, 1981, with Judge Paul C. Weick vigorously dissenting (App. A212 to A223).

REASONS FOR GRANTING THE WRIT

This petition raises vital issues of national importance concerning the right of the people and their elected city officials to regulate land use and make housing decisions free from federal government dictation. It involves the important question of whether the Fair Housing Act authorizes massive federal court intrusion into the decision-making power of home-rule local governments, which question has not been, but should be, settled by this Court. Do federal courts have authority to order cities to provide housing for low-income persons, to deny and abridge the cherished right of the people to vote in referendums on account of their race, and is the Attorney General immune from justiciability, statute of limitations, and *res judicata* considerations when he brings suit against a municipality under claimed authority of the Fair Housing Act? The following special and important reasons for granting review on writ of certiorari are submitted for consideration by the Court.

1. THE IMPORTANT QUESTION OF WHETHER THE FAIR HOUSING ACT APPLIES TO THE LOCAL GOVERNMENTAL ACTIVITIES OF MUNICIPALITIES HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 271 (1977), this Court expressly left undecided the important question of whether the Fair Housing Act, 42 U.S.C. §3601 *et seq.*, applies to zoning decisions of a municipality.

Parma contends that both the wording of the Fair Housing Act and its legislative history clearly indicate it is limited in its application to private housing transactions.

It was not intended to supersede municipal home rule and the ultimate sovereignty of the people, or to require local governments to provide public or low-rent housing for persons of low income in the absence of any demand therefor by their residents.

When Congress intends to include municipalities under the coverage of a federal law listing specific entities within the definition of "person" as used in the act, it specifically mentions them. For example, in 1972 Congress enacted Public Law 92-261 amending the Equal Opportunities Act to add the entities "governments, governmental agencies, political subdivisions" to the definitions section, 42 U.S.C. §2000e-(a).

There is no such reference to municipalities in the definition of "Person" in the Fair Housing Act, 42 U.S.C. §3602(d) (App. A225). Nor are any local governmental functions described in any of its provisions. Nor is there one statement in the congressional debates to indicate any intent to include municipalities making and enforcing housing and zoning decisions within the ambit of the Act. For example, when he introduced the legislation, Senator Mondale stated that "The Act will cover brokers, property owners, managers, and anyone else who participates in the sale, rental, or financing of housing." 114 *Congressional Record* 2272. No one contested what Senator Thurmond, an opponent of the legislation, said: "The first concept to be kept in mind throughout any discussion of this title is that the subject sought to be regulated and the matter upon which it is proposed to legislate in this amendment is the private dealings between individuals. This amendment does not even purport to have any State involvement or involvement by any official person, or body of the State." *Ibid.* at 2717-18.

That the Act was never intended to be used to force cities to supply public or low-rent housing is evident from the congressional remarks of its prime sponsors. The purpose of the legislation was to help people who could afford housing to obtain it without discrimination. Senator Brooke said that fair housing "will scarcely lead to a mass dispersal of the ghetto population to the suburbs; but will make it possible for those who have the resources to escape the stranglehold now suffocating the inner cities of America", 114 *Congressional Record* 2279, and predicted that "there will not be this great rush to the suburbs. There never has been. As people are educated and have the opportunity and wherewithal to move, they ought to be able to move." (*Ibid.* at 2282-3). Senator Mondale indicated that the thrust of the legislation was to aid "the growing capacity of Negroes to afford decent housing", *Ibid.* at 2283, "so that those who can afford and wish to do so may, like all other Americans, buy any house they can afford to purchase" (*id.* at 2293-4). Senator Tydings stated that "Negroes in this country must have freedom to live where they can afford to live, irrespective of race", and urged enactment of the legislation "so that Negroes are given the freedom which all other Americans now possess—to live in any neighborhood which their income permits" (*ibid.* at 2528).

Furthermore, Congress has not repealed the local-consent requirement before federal funding of public housing can be granted, and this Court in *James v. Valtierra*, *supra* at 141, approved and commended referendums on whether or not to give such consent:

> "This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues.

> It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decision making does not violate the constitutional command that no State shall deny to any person 'the equal protection of the laws.' "

Even if it could ever be said that the Act was intended to cover local governmental functions, or to force cities to provide public or low-rent housing, the Act would be unconstitutional for violating the constitutional principles of Our Federalism, comity, and separation of powers. As succinctly stated by Justice Black in *Karr v. Schmidt*, 401 U.S. 1201, 1203 (1971):

> "Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs."

The rationale of the separation of powers doctrine applies as well to the "delicate issues of federal-state relationships underlying this case". *Mayor of the City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 (1974). Furthermore, when the frame of reference moves from a unitary court system to a system of federal courts "representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief". *Rizzo v. Goode*, 423 U.S. 362, 379 (1976).

In the very first section of the Fair Housing Act, 42 U.S.C. §3601, it is expressly stated that "constitutional limitations" apply (App. A225). The Constitution in Article IV, Section 4 specifically guarantees to every State

a "Republican Form of Government" (App. A224), and the Fifteenth Amendment (App. A224) unequivocally prohibits the United States from denying or abridging the cherished right to vote on account of race. It is therefore clear that if the district court can rely on the wording of the Fair Housing Act to supplant representative government in Parma with court-controlled committees, and to deny and abridge the right of the people of Parma to vote in referendums, the Act is unconstitutional on its face or as applied.

2. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL.

In affirming the district court's ordering Parma to provide public and low-income housing and the other extravagant aspects of the remedial order, the court of appeals upheld such massive intrusions into local home rule in a way in conflict with decisions of other federal courts of appeal.

In *Acevedo v. Nassau County, New York*, 500 F.2d 1078, 1082 (2d Cir. 1974), the court held that "The Fair Housing Act does not impose any duty upon a governmental body to construct or to 'plan for, approve and promote' any housing."

In *Citizens Committee for Faraday Wood v. Lindsay*, 507 F.2d 1065, 1071 (1974), *cert. denied*, 421 U.S. 948 (1975), the court held that "a city cannot be compelled to build and finance a specific housing project designated, in part, to aid low-income families or any specified group of its citizens simply because it started to plan such a project." It also held, contrary to the district court, that "the city's actions need not be justified by a compelling governmental interest."

Upon remand from this Court, the Seventh Circuit Court of Appeals in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1293 (1977), held that

> ". . . if the defendant is a governmental body acting within the ambit of legitimately derived authority we will less readily find that its action violates the Fair Housing Act. *See Joseph Skillken & Co. v. City of Toledo . . . .", supra.*

It further held, on the same page:

> "The courts ought to be more reluctant to grant relief when the plaintiff seeks to compel the defendant to construct integrated housing or take affirmative steps to ensure that integrated housing is built than when the plaintiff is attempting to build integrated housing on his own land and merely seeks to enjoin the defendant from interfering with that construction."

Thus, while the courts below disregarded the controlling *Skillken* case previously decided by another panel of the court of appeals below, the Seventh Circuit recognized its cogent reasoning.

3. THE COURT OF APPEALS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In affirming the invalidation of Parma's referendum provision on whether or not to give the federally-required consent to build public housing, and in abridging the right to vote on zoning changes, the court of appeals completely disregarded this Court's decisions in *James v. Valtierra, supra,* and *City of Eastlake v. Forest City Enterprises, Inc.,*

426 U.S. 668 (1976), which upheld similar provisions, claiming they were "inapposite" (App. A22).

Although this Court in *Hills v. Gautreaux*, 425 U.S. 284 (1976), held that municipalities cannot be forced to apply for Community Development Block Grant (CDBG) funds, at 303, and at 305 that they retain the right to "require that zoning and other land-use restrictions be adhered to by builders", the court of appeals upheld liability determinations based on Parma's not reapplying for such funds and for rejecting plans not complying with its zoning requirements, and upheld an order to apply for CDBG funds. Last term, this Court upheld the right of local authorities to determine whether or not to accept federal funds in *Pennhurst State School and Hospital v. Halderman*, ... U.S. ....., 101 S. Ct. 1531, 1534 (1981).

Despite the teachings of *Warth v. Seldin*, 422 U.S. 490 (1975), as to the requirements of Article III, the court of appeals allowed the Attorney General to maintain this suit and obtain the extravagant, unprecedented remedial order even though there was not shown any actionable causal relationship between Parma's zoning practices and any alleged injury to low-income persons, for whose benefit the Attorney General brought suit. The remote possibility that black persons might benefit from the forced-housing decree is refuted by the fact that none have become tenants in the Independence Place project actually built by Forest City, despite affirmative marketing attempts, at any time since the project was completed eight years ago.

4. THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND SO FAR SANCTIONED SUCH A DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS BY THE DISTRICT COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

It is axiomatic that lower federal courts are bound by Supreme Court decisions, and that, in the absence of an *en banc* overruling, one panel of a court of appeals and the district court are bound by prior controlling decisions of another panel of the same court of appeals. The doctrine of *res judicata* is likewise binding on both the district court and court of appeals, and "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc. v. Mortie,* ..... U.S. ..... (1981), 101 S. Ct. 2424, 2427.

Despite the fact that the court of appeals in the *Mahaley* case, *supra,* reversed the same district judge who decided this action, for holding Parma (and four other suburbs) guilty of violating the Fair Housing Act because they have no public housing, the court below upheld the liability decision in this action predicated on Parma's not having public housing. The court of appeals in *Mahaley* clearly held that it is for the municipalities to decide whether they need low-rent housing and whether they desire to sign cooperation agreements to obtain federal funding; that no one has a right to public housing either in his own city or in a city in which he does not reside; that there is no basis to infer discrimination on the part of a municipality for doing what it has a lawful right to do under the express provisions of the housing act, and

that it would be a violation of the separation of powers doctrine to order city councilmen to vote any certain way. Not only was *Mahaley* binding on the courts below as the controlling law of the Sixth Circuit, but because both Parma and the government, through the Department of HUD, as well as private plaintiffs in privy with the Attorney General were parties in that case, it was *res judicata* as well.

As cogently stated by the court in *United States v. West Suburban Board of Realtors*, 1 EOHC §13,641, at pages 14,195-6 (N.D. Ill. 1974):

> "Moreover, we do not read §3613 as creating any greater rights in the victims of housing discrimination than those set forth in §3612. When the government is acting in a representative capacity, it must be guided by the same statutory scheme as are individuals when acting on their own behalf."

As trenchantly pointed out by Judge Paul C. Weick in his opinion dissenting from the denial of an *en banc* rehearing in the court of appeals (App. A213 to A223), the court of appeals so far departed from the usual course of judicial proceedings, as outlined above, and disregarded and allowed the district court to disregard controlling decisions of another panel of the court of appeals and of this Court, as to call for an exercise of this Court's power of supervision.

CONCLUSION

This important litigation involves vital questions relative to the limits of federal power over local home-rule communities and their residents. One of the most preferred constitutional rights is the cherished right to vote. The Constitution expressly prohibits the United States, in any of its branches, from denying or abridging that right on account of race or color. It also guarantees a republican form of government, not a judiciary-dominated one. Yet, at the instance of the chief law-enforcement official of the United States, the lower federal courts in the guise of enforcing the Fair Housing Act, which is to be applied "within constitutional limitations", have ordered that petitioner provide public and low-income housing, have denied and abridged the cherished right to vote in referendums on account of race and color, and have supplanted elected city officials with appointed committees answerable to the district court to make housing, zoning, and other decisions affecting the people of Parma.

Despite the fact that two class-action suits by plaintiffs with whom the Attorney General is in privy were decided in petitioner's favor on justiciability, statute of limitations, and identical factual and legal issues on the merits, this litigation was allowed to proceed to judgment and the issuance of an unprecedented, wide-ranging decree constituting a virtual federal takeover of an American city, for the stated purpose of attempting to dilute the naturally-occurred, mostly-white, ethnic-minorities composition of the city. But a federal court's power "cannot be enlarged by its emotions", *Herrera v. United States*, 222 U.S. 558, 572 (1912), and "jurisdiction is not a matter of sympathy or favor", *Reid v. United States*, 211 U.S. 529, 539 (1909). As the distinguished dean of the Court of Appeals for the

Sixth Circuit, Judge Paul C. Weick, stated in his dissenting opinion (App. A221), the decision of the court below "is clearly wrong."

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted, the decision of the court of appeals summarily reversed, and the case remanded for dismissal of the action.

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Appendix

81-1317

No.

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In the Supreme Court of the United States

October Term, 1981

CITY OF PARMA, OHIO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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TO THE UNITED STATES COURT OF APPEALS
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OPINION OF COURT OF APPEALS

(Decided and Filed October 14, 1981)

No. 81-3031

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CITY OF PARMA, OHIO,
Defendant-Appellant.

APPEAL from the United States District Court for the Northern District of Ohio.

Before: LIVELY, KEITH and MERRITT, *Circuit Judges.*

LIVELY, *Circuit Judge,* delivered the opinion of the Court in which KEITH, *Circuit Judge,* joined. MERRITT, *Circuit Judge* (pp. 31-36) filed a separate opinion dissenting in part.

LIVELY, *Circuit Judge.* This is an appeal from the final decision of the district court in an action under the Fair Housing Act of 1968, Pub. L. 90-283, Title VIII, § 801 *et seq.*, 42 U.S.C. § 3601 *et seq.* (Title VIII or the Act). The district court found that the City of Parma had engaged in a number of acts which had the purpose and effect of maintaining Parma as a segregated community in violation of the Act. A broad remedial order was entered.

I.

A.

The Attorney General filed the present action in the United States District Court for the Northern District of Ohio on April 27, 1973 seeking to enjoin Parma from violating the Act.[1] Such an action by the Attorney General is authorized by § 813 of the Act, 42 U.S.C. § 3613[2] if the conditions of that section are met. Parma filed a counterclaim in which it requested that a three-judge court be convened; this request was denied. Thereafter the defendant filed a motion for summary judgment, which was denied by the district court in an order which identified three material issues of fact in dispute:

1. Whether Parma's virtually all-white character occurred adventitiously as a result of unrestricted

---

1. Initially, the case was consolidated with a suit filed under the Act by several individuals and the NAACP. The complaint of the individuals and the NAACP was subsequently dismissed for lack of standing, absence of a justiciable controversy and untimeliness. *Cornelius v. City of Parma*, 374 F.Supp. 730 (N.D. Ohio), *vacated and remanded*, 506 F.2d 1400 (6th Cir. 1974), *vacated and remanded*, 422 U.S. 1052, *remanded for dismissal*, 521 F.2d 1401 (6th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976).

2. § 3613. Enforcement by the Attorney General; issues of general public importance; civil action; Federal jurisdiction; complaint; preventive relief

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full employment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necesary to insure the full enjoyment of the rights granted by this subchapter.

free choice in the market place as defendant contends or whether it resulted from deliberate discrimination which was caused or perpetuated by defendant's conduct;

2. Whether successive decisions by defendant City of Parma or by and through its officials which resulted in the exclusion of various types of federally subsidized and potentially integrated housing had the purpose or effect of making housing unavailable to persons because of race; and

3. Whether Forest City's proposal to construct Parmatown Woods was rejected solely on nondiscriminatory grounds, as Parma contends, or was treated less favorably than other proposals, wholly or partially because of the actual or anticipated race of some of the prospective residents.

United States v. City of Parma, 471 F.Supp. 453, 454-55 (N.D. Ohio 1979).

B.

Following a trial on the issue of liability the district court concluded that the record established Parma's violation of the Act in a series of actions which had both the purpose and effect of maintaining Parma as a virtually all-white community. *United States v. City of Parma, Ohio,* 494 F.Supp. 1049 (N.D. Ohio 1980). The court made two initial findings:

> An extreme condition of racial segregation exists in the Cleveland metropolitan area.

Id. at 1055; and

> The proposition that the Cleveland metropolitan area and Parma became racially segregated solely as a result of associational preferences and economics,

> and not because of racial discrimination, is refuted overwhelmingly by the evidence in this case.

Id. at 1057. The court then made nine findings on the causes of the "dual housing market" which is found to exist in the Cleveland metropolitan area. In addition to private activities such as discriminatory acts of real estate dealers, "red lining" by lenders and insurers and refusals to list or sell by private owners, the court found that policies of the Federal Housing Administration and the Veterans Administration, particularly with respect to restrictive covenants, and site and tenant selection practices of the Cuyahoga Metropolitan Housing Authority (CMHA) had contributed to and maintained a black ghetto on the east side of Cleveland. *Id.* at 1057-59.

Parma, the largest suburb of Cleveland, lies west of the Cuyahoga River. According to the 1970 census, Parma had a population of 100,216 of whom 50 were black. The same census disclosed that metropolitan Cleveland had a population of 2,064,194 of whom 332,614 were black. Thus while the metropolitan area had a black population of 16%, Parma's was a small fraction of one per cent. The largest concentration of black residents was in the east side of the City of Cleveland and in a few eastern suburbs. The district court rejected Parma's two explanations for the segregated condition of the Cleveland area—associational preference and economic factors. In doing so, the court considered expert testimony from both parties and concluded that the experts produced by the government supported their conclusions better than those who testified for the City. *Id.* at 1059-65.

The district court then considered the evidence which the government had introduced to prove that Parma had followed racially exclusionary policies and practices. This evidence included testimony that Parma had a reputation

and image of being the Cleveland suburb most hostile to blacks and statements of elected officials of Parma which were either overtly racist or were found to have racist meanings. These findings were cited as the backdrop against which the government challenged five specific actions or series of actions in this lawsuit:

(A) Parma's refusal to enact a fair housing resolution welcoming "all persons of goodwill";

(B) Parma's general opposition to all forms of public and low-income housing;

(C) Parma's denial of building permits for a privately-sponsored low-income housing development—Parmatown Woods;

(D) Parma's enactment and application of four land use ordinances which impose height, parking and voter approval limitations on housing developments; and

(E) Parma's refusal to submit an adequate housing assistance plan in connection with its application for Community Development Block Grant Funds.

Id. at 1066. Each of these actions of the defendant was then discussed at length.

The district court concluded that the rejection by the Parma City Council of a "weak resolution" of welcome in the face of intense local opposition was a symbol of the official attitude and "sent out the message that black people of goodwill were not welcome." *Id.* at 1068. In reaching this conclusion the court rejected the mayor's testimony that he opposed the resolution only because it was superfluous in view of state law which provided for fair housing.

The district court reviewed the history of public housing in the Cleveland metropolitan area and noted that most of the conventional public housing in the area had been built inside Cleveland. A severe shortage of public housing was found to exist in the area, and this shortage was attributed directly to the exclusion of such housing from the suburbs. Parma was found to have a genuine need for public housing. Moreover, more than 1300 families living inside Cleveland and eligible for public housing had expressed an interest in moving to Parma. Parma had refused to participate in programs of the CMHA which would have brought low-income housing to the City. The district court determined that Parma's failure to seek and provide low-income housing was based on a desire to keep minorities out of the community and concluded that "Parma's opposition to any form of public or low-income housing has had an acute and foreseeable segregative effect on this virtually all-white city." *Id.* at 1072. The court again rejected explanations for the City's actions put forward by the mayor in his testimony.

One of the acts which precipitated the citizens' suit was Parma's rejection of a proposal by a private builder to construct a federally subsidized multiple-family housing project to be called Parmatown Woods. Building permits for Parmatown Woods were denied after review by Parma officials. The stated reason for the denial was the developer's failure to comply with Parma's land use ordinances. The court found that Parma had not required strict compliance with all its ordinances and procedures in at least four other instances involving apartment projects, one a "luxury" multi-family development by the same organization which proposed to build Parmatown Woods. The court detailed the widespread opposition to Parmatown Woods revealed by the evidence and concluded that it was racially motivated. It was during pendency of the

Parmatown Woods proposal that both the mayor and the president of the city council were found to have made public racist statements. *Id.* at 1079-80.

The district court stated its ultimate finding with respect to the Parmatown Woods denial as follows:

> The Court finds that an important reason for the denial of the building permits was the fear that blacks would live in Parmatown Woods. This fear resulted in deviations from standard procedure and substantive norms and rendered impracticable, if not impossible, compliance with the land-use ordinances.

Id. at 1074. The developers abandoned Parmatown Woods and built a similar project in a village adjacent to Parma.

The day before the Parmatown Woods application was rejected the voters of Parma adopted two land use ordinances by referendum. One ordinance limited all future residential structures to a height of 35 feet (Parmatown Woods, with 10 floors, would have been much higher) and the other required voter approval for the development, construction or acquisition of a subsidized housing project by a public body or participation by individuals or non-public bodies in any federal rent subsidy program. The initiative petitions which resulted in placing these ordinances on the ballot were circulated during the period when the Parmatown Woods proposal was being debated publicly. The court recognized that there had been opposition to high-rise construction in Parma for some time and that many residents opposed such construction for non-racial reasons. Nevertheless, the court found persuasive evidence to indicate that racial considerations were involved in the passage of both ordinances, and that their effect was to "make the construction of any public or low-income housing very difficult." *Id.* at 1088.

The government contended that two other Parma ordinances have a racially exclusionary effect. One requires 2½ parking spaces per dwelling unit and the other requires voter approval for any change in the zoning code or in existing land uses. The latter ordinance was adopted after this lawsuit was filed. Finding that the parking space requirement is abnormally high and that the voter approval requirement for zoning changes adds costly delay to the process of obtaining clearance to construct low-income housing, the court concluded that the effect of the ordinances was to perpetuate housing segregation. The court found, however, that there was no showing that either of these ordinances was adopted for the purpose of excluding minorities. *Id.* at 1089.

Parma applied for funds under the Community Development Block Grant program (CDBG) which is designed to bring federal funds for housing and community development to local governments. The Parma application was rejected by HUD because the City did not submit an adequate "housing assistance plan." In rejecting the application HUD found Parma's goal of "zero" for housing assistance to low-income persons to be inconsistent with demonstrated needs. The district court rejected explanations for the City's refusal to correct the deficiency in the application. In doing so the court made credibility determinations. The finding on the issue of CDBG funds was stated thus:

> The receipt of CDBG funds would have helped the City of Parma to provide an equal opportunity in housing for all races (Tr. 715). By rejecting the funds, Parma assured that it would continue to be an almost totally segregated community. The Court finds that Parma's submission of an inadequate CDBG application and its refusal to amend that application

were intended to foreclose, and in fact have foreclosed, housing opportunities that would otherwise have been made available to all low-income persons, including blacks.

Id. at 1094.

In light of its findings of fact the district court concluded that a violation of the Act by Parma had been established:

> The Court, after considering the evidence in its entirety, is convinced that Parma engaged in a pattern and practice of resistance to the full enjoyment of the rights granted by Sections 804(a) and 817 of the Fair Housing Act by following a consistent policy of making housing unavailable to black persons. The Court also finds that the City's actions denied the rights secured by Sections 804(a) and 817 to groups of persons. The Court's findings are based on both a standard of racially discriminatory intent and a standard of racially discriminatory effect. *See* pp. 1052-1055, *supra*. Under either standard, Parma's actions amounted to violations of provisions of the Fair Housing Act which forbid discrimination in housing on the basis of race.
>
> The Court specifically finds that the rejection of the fair housing resolution, the consistent refusal to sign a cooperation agreement with CMHA, the adamant and long-standing opposition to any form of public or low-income housing, the denial of the building permit for Parmatown Woods, the passage of the 35-foot height restriction ordinance, the passage of the ordinance requiring voter approval for low-income housing, and the refusal to submit an adequate housing assistance plan in the Community Block Develop-

> ment Grant application, individually and collectively, were motivated by a racially discriminatory and exclusionary intent. The purpose of these actions, the Court finds, was to exclude blacks from residing in Parma and to maintain the segregated "character" of the City. These actions, individually and collectively, also violated the Fair Housing Act by denying to blacks, Parma residents, and prospective low-income housing developers rights secured by Sections 804(a) and 817.

Id. at 1095-96.

In reaching these conclusions the district court considered the public statements of elected city officials, the open hostility to low-income housing exhibited by residents and officials alike and departures from normal practices by subordinate city employees in handling the Parmatown Woods application.

C.

The district court entered a separate remedial order following submissions by the parties and a hearing. *United States v. City of Parma*, 504 F.Supp. 913 (N.D. Ohio 1980). The "comprehensive remedial plan" formulated by the court, *Id.* at 916, contains a general injunction against discrimination in housing by the City and a number of affirmative requirements. The general provision permanently enjoined the City, its officers, etc. from:

> 1. Engaging in any conduct having the purpose or effect of perpetuating or promoting racial residential segregation or of denying or abridging the right of any person to equal housing opportunity on account of race, color, religion, sex or national origin;

2. Discriminating against any person or group of persons on account of race, color, religion, sex or national origin in connection with the planning, development, construction, acquisition, financing, operation or approval of any low-income or public housing units;

3. Interfering with any person in the exercise of his right to secure equal housing opportunity for himself or for others; and

4. Taking any action which in any way denies or makes unavailable housing to persons on the basis of race, color, religion, sex or national origin.

Id. at 918.

The defendant was additionally ordered to: (1) establish a mandatory fair housing educational program for all city officials and employees involved in carrying out the terms of the remedial orders; (2) enact a resolution welcoming persons of all races, creeds and colors to reside in Parma and setting forth its policy of nondiscrimination in housing; (3) undertake a comprehensive program of newspaper advertising to promote Parma as an equal housing opportunity community and to make copies of the liability opinion and remedial order available, free of charge; (4) take "whatever action is necessary in order to allow the construction of public housing in the City," *Id.* at 922; (5) adopt a plan for use of an existing "Section 8" housing program; (6) take required steps for submitting an acceptable application for CDBG funds; (7) "make all efforts necessary to ensure that at least 133 units of low and moderate-income housing are provided annually in Parma. This number is a threshold beyond which Parma must strive to go in providing new housing opportunities in the City. This is so because, in addition to addressing its

current needs, Parma must address those low-income housing needs which have been in existence since at least 1968 but which have been ignored by Parma for racial reasons. This Court can require no less in carrying out its obligations in this action." *Id.* at 923 (footnote omitted).

In addition to the foregoing affirmative requirements the order contained provisions which invalidated the ordinance which required all low-income housing proposals to be submitted in a referendum and limited the other three ordinances in question so that they will not apply to hinder any development of low or moderate-income housing in Parma. The order also provided for the establishment of a fair housing committee within city government with specified functions and an evaluation committee to be appointed by the district court. Finally, the district court appointed a special master to see that the provisions of the order are carried out in an orderly manner. Seven "powers and functions" of the special master were set out in the order:

> 1. The Special Master shall oversee the formulation, by the Fair Housing and Evaluation Committees, of the remedial procedures to carry out the provisions of this Order. He shall evaluate the sufficiency as well as the practicability of these procedures in light of the purposes which they are intended to serve;
>
> 2. The Special Master shall be available, during the formulation process, on a regular basis, to give advice to and to serve as an arbitrator of possible disputes between the parties and/or Committees. All questions which the parties and/or Committees may have concerning this Order and their duties thereunder shall be directed first to the Special Master. Questions which cannot be resolved by the Special Master may be addressed directly to the Court;

3. The Special Master shall prepare and submit to the Court recommendations concerning the remedial plan prepared pursuant to this Order, together with any revisions or alternative plans which he deems necessary to carry out the Court's mandate in this action;

4. The Special Master may conduct such hearings and investigations as he deems necessary to the performance of his duties;

5. The Special Master may utilize the services, when necessary, of experts in various fields in performing his duties under this Order. The Special Master and such experts shall have complete and unrestricted access to the records of defendant City of Parma. They shall have free access to all Parma employees and staff. They shall be given notice of and free access to all meetings, public or private, at which this Order and the remedial plan to be formulated hereunder are to be discussed. The Special Master shall determine the time and place of all meetings except those regularly scheduled governmental meetings whose time and place have been established by State law, local ordinance, or long-standing custom or tradition. Meetings set by the Special Master shall have precedence over all other business of the City. The Special Master shall preside over those parts of every meeting he attends which are, in his judgment, related to these Remedial Orders. The Special Master may bring official reporters to record and then to transcribe the minutes of said meetings, executive or otherwise. Records of executive sessions shall be held in confidence by the Special Master, his advisers, and the reporters, unless otherwise ordered by the Court. It is the intention of the Court that the Special Master's access to private meetings shall be interpreted broadly

to include, for example, executive sessions and councilmanic caucuses;

6. With the consent of the attorneys for both parties, the Special Master may, as the need arises, contact and confer with the attorneys for the respective parties. If counsel for one party does not so consent, the Special Master may order a meeting with both parties;

7. The Special Master shall oversee the implementation of the ultimate remedial plan for this litigation and report to the Court, on a regular basis, concerning Parma's progress under this Order. Such report may contain recommendations, if necessary, concerning action to be taken by Parma to improve compliance with the remedial plan.

Id. at 925.

II.

A.

In this appeal Parma contests virtually every conclusion of the district court, though it does not claim explicitly that any subsidiary findings upon which those conclusions are based are clearly erroneous. Instead, in its statement of facts the City relies on evidence which it introduced even though much of it was specifically rejected by the district court. Of course, this court cannot substitute its evaluation of the credibility of witnesses and the weight to be accorded various items of evidence for that of the trial judge. Our examination of the record on appeal convinces us that the findings of fact are not clearly erroneous. The City contends that many of the district court's findings involve mixed questions of fact and law and that because the district court used incorrect legal stan-

dards this court must review such findings fully, not limited by the "clearly erroneous" standard.

B.

Some of the claimed errors refer either to jurisdiction of the court or to procedural matters.

1. The City contends that the district court had no jurisdiction to proceed in this case as a single-judge court. In its counterclaim the defendant alleged that the residents of Parma, as descendants of immigrants, had been subjected to discrimination and bigotry in the past by the government as well as by private persons and that the government had never attempted to alleviate this discriminatory treatment by way of affirmative action. The counterclaim charged the government with selective enforcement of the Act and requested that a three-judge court be convened to determine the constitutionality of the Act as applied to Parma and its residents.

Under 28 U.S.C. § 2282 (1970), which has been repealed but was in effect when this action was filed, a three-judge court was required to be convened if a pleading raised a substantial constitutional issue and sought to restrain the enforcement, operation or execution of an Act of Congress. The counterclaim in the present case did neither. It merely sought a declaration that the Act was unconstitutional as applied to a single community and its residents. *See Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963). Furthermore, the constitutional claim was patently unsubstantial, if not frivolous. *See generally, Goodsby v. Osser,* 409 U.S. 512 (1973).

2. Parma also asserts that the district court lacked subject matter jurisdiction because none of the provisions of the Act apply to governmental activities of municipalities.

The City argues that neither the language of the Act nor its legislative history indicates a congressional intent to have it apply to municipalities.

We have examined the references to legislative history cited by both parties and find the history inconclusive. This is not surprising since Title VIII was added to the 1968 Civil Rights Act as a floor amendment. Thus, there is no committee report upon which to rely. While it appears to be true, as the City claims, that the Act was aimed primarily at the real estate industry, the legislative history does not establish with certainty that its operative provisions were not intended to be applied more broadly.

Turning to the language of the Act, it is apparent that its purposes were broadly stated. Section 801, 42 U.S.C. § 3601, states, "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." Many of the operative provisions of the Act are contained in § 804, 42 U.S.C. § 3604:

> § 3604. Discrimination in the sale or rental of housing
>
> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

Parma contends that the use of "person" in the Act indicates an intent to reach only private transactions and practices in the real estate business. If Congress had intended to include municipalities, it is argued, it would have done so by specifying local governmental activities. The government answers that discriminatory acts of municipalities in the field of housing are proscribed by the language in § 804(a), "or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin." It argues that the acts of Parma which the district court found to violate the Act did "otherwise make unavailable or deny" dwellings to black residents of the Cleveland area who need low-cost housing.[3] Given the broadly stated purpose of the Act

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3. In addition to claiming that the City's actions violated § 804(a), the government asserts that denial of the building application for Parmatown Woods violated § 817, 42 U.S.C. § 3617:

(Continued on following page)

and the fact that § 813 authorizes suit against the "person or persons" responsible for violations, the government argues that the Act reaches discrimination in housing regardless of the identity or nature of its perpetrator. It points out that "person" has been held to include municipalities in other civil rights acts. *See Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978).

The courts of appeals which have considered the question of whether a city may be sued under the Act have answered in the affirmative. *See United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1183-84 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975), where the issue was squarely decided. The same answer to the question is implicit in the decisions in *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978), and *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). Furthermore, in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.* [*Arlington Heights I*], 429 U.S. 252, 271 (1977), the Supreme Court, following a finding that the intent necessary to establish a constitutional violation had not been proven, remanded for determination of whether "a zoning decision made by a public body may, and that petitioners' [the village's] action did, violate § 3604 or § 3617." Upon remand the court of appeals found that a zoning decision of a public body can, and

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Footnote continued—

§ 3617. Interference, coercion, or intimidation; enforcement by civil action

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action.

The district court found violations of both § 804 and § 817.

in the Arlington Heights case, most likely did violate the Act. The Supreme Court denied certiorari following the remand decision. *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights* [*Arlington Heights II*], 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

In agreement with the courts which have applied Title VIII to municipalities we conclude that the comprehensive purpose of the Act would be diluted if it were held to apply only to the actions of private individuals and entities. No intent to so restrict it may be gleaned from the language of the Act. On the other hand, § 815, 42 U.S.C. § 3615, provides in part "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." This provision is not self-executing, and would require legal action against the offending state or political subdivision for its enforcement. We believe it was the intent of Congress to provide for actions against states and political subdivisions for violation of § 804, § 817 and § 813 as well.

3. Parma also maintains that the Attorney General lacked standing to bring this action. This argument is difficult to understand. Section 813 of the Act clearly authorizes the Attorney General to sue. The threshold requirement is merely that he have "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice" of resistance to full enjoyment of the rights granted by the Act, or that denial of such rights to any groups of persons "raises an issue of general public importance . . . ." *See, e.g., United States v. Pelzer Realty Co.*, 484 F.2d 438, 444-45 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). The complaint pled the existence of both of the enumerated conditions and the district court found

both to exist in fact. The City's argument appears to turn on its insistence that a municipality is not a "person" within the meaning of the Act. Since we have decided that the Act does apply generally to activities of municipalities, we see nothing in its language to indicate that a different interpretation should apply to pattern and practice suits brought under § 813.

4. The final procedural argument of Parma is that this action was barred by the 180-day time limit contained within the Act.[4] The City contends that the triggering acts were passage of the voter-initiated ordinances on November 2, 1971 and rejection of the Parmatown Woods building permit application on November 3, 1971. The 180-day provision applies to civil actions by private persons where a discrete act of discrimination is alleged. A pattern and practice suit necessarily involves a number of discriminatory acts, not a particular one from which the time for bringing suit may be measured. *Cf. United States v. Mitchell*, 327 F.Supp. 476, 485 (N.D. Ga. 1971). The charge is more like one of a "continuing violation." Our decision in *Warner v. Perrino*, 585 F.2d 171 (6th Cir. 1978), an action by a private individual, does not require a different conclusion.

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4. Section 812(a) of the Act, 42 U.S.C. § 3612(a), provides in part

§ 3612. Enforcement by private persons

(a) Civil action; Federal and State jurisdiction; complaint, limitations; continuance pending conciliation efforts; prior bona fide transactions unaffected by court orders

The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred.

C.

The substantive contentions of the City are divided into three arguments, exclusive of those which deal directly with remedy.

1. The City argues that if the Fair Housing Act purports to apply to governmental activities of municipalities, it is unconstitutional. Support for this argument, it is claimed, is found in *National League of Cities v. Usery*, 426 U.S. 833 (1976). In that case the Supreme Court held that the Tenth Amendment prevents Congress from exercising its powers under the Commerce Clause "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions . . . ." *Id.* at 852. The holding in *National League of Cities* does not control the present case. The Fair Housing Act was not enacted pursuant to the Commerce Clause. Rather it was based on authority of § 2 of the Thirteenth Amendment. *United States v. City of Black Jack, supra*, 508 F.2d at 1184; *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 120-21 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973). In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), the Supreme Court, speaking through Justice Rehnquist, stated "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." (Citations and footnote omitted). The Thirteenth and Fourteenth Amendments were adopted following the Civil War and both were intended to limit the authority of the states. *Id.* at 453-55. Congress acted within its constitutional authority in making Title VIII applicable to the states and their political subdivisions.

2. The City also contends that the district court erred in failing to follow the established law of this circuit. Two decisions of this court are relied upon principally: *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975), and *Joseph Skillken & Co. v. City of Toledo*, 528 F.2d 867 (6th Cir. 1975), *vacated and remanded*, 429 U.S. 1068, *decision adhered to*, 558 F.2d 350 (6th Cir.), *cert. denied*, 434 U.S. 985 (1977). Where there is language in the opinions in the above cases which supports some of the arguments of Parma, particularly with respect to the scope of the remedy, the holdings of the cases are not controlling here. *Mahaley* was a suit under the Housing Act of 1937, not the Fair Housing Act of 1968. The two statutes are quite different in their purposes and structures. The 1937 Act was not concerned primarily with ending discrimination in housing—the clear purpose of the 1968 Act. The holding of this court in *Skillken* was based on a finding that no racial discrimination was shown to have been involved in the city's refusal to grant a rezoning request and that Toledo was not racially segregated. We hold that on the record before us the district court did not err in reaching a contrary conclusion in the present case. More important for present purposes is the fact that in *Skillken* this court did not base its holdings on a construction of Title VIII. In fact, the Fair Housing Act is not mentioned in any of the dispositive language of the opinion. We find the Supreme Court's decisions in *James v. Valtierra*, 402 U.S. 137 (1971) and *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), cited by Parma in support of this argument to be equally inapposite.

3. Parma next argues that "the government did not sustain its heavy burden of proving its clear entitlement to an injunction, and the district court erred in determining

liability under the Fair Housing Act . . . ." The City has repeated many of its earlier arguments in this portion of its brief. The primary thrust appears to be that the district court's conclusions with respect to segregation and racial discrimination in housing are unsupported by the record. Thus, the City asserts that none of the five grounds relied upon by the district court in granting relief furnishes a valid basis for its judgment.

(a.) The failure of the city council to adopt a resolution welcoming all persons of goodwill to Parma had only symbolic value, as the district court conceded. Certainly this failure alone would not have supported a finding of intent to exclude minorities from the City. However, there was ample testimony that Parma already had a reputation among black residents of the Cleveland area of hostility to racial minorities. Given the context in which the council debate and vote took place, we cannot hold that the district court erred in concluding that this event constituted part of a pattern or practice of official conduct which violated the Fair Housing Act.

(b.) The district court held that Parma unlawfully rejected public and low-income housing. Parma argues that it was not required to promote low-income or public housing. Two decisions are cited for the proposition that an action against a municipality for declining to include low-income or publicly financed housing in development plans fails to state a claim upon which relief may be granted. *See Acevedo v. Nassau County, N.Y.*, 500 F.2d 1078 (2d Cir. 1974); *Citizens Comm. for Faraday Wood v. Lindsay*, 507 F.2d 1065 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). Neither of these cases was brought by the Attorney General on the basis of a pattern or practice of discrimination. Further, there was no finding of discriminatory intent in the action of either local govern-

ment. Finally, the actual holding in *Faraday Wood* was a narrow one—"that a city cannot be compelled to build and finance a specific housing project designated, in part, to aid low-income families or any specified group of its citizens simply because it started to plan such a project." 507 F.2d at 1071. Since the district court did not order Parma to build or finance a specific project this holding has no relevance to the present case.

The district court rejected Parma's explanation for failing to seek low and moderate-income publicly financed housing—that the CMHA was inept and the City did not want to deal with it. There was evidence of a number of programs in which Parma could have participated without becoming involved with the CMHA. The evidence of a need for such housing, both among Parma's residents and others in the greater Cleveland area who would consider moving to Parma, was unrebutted. The evidence supported the district Court's conclusion that this failure of the City was part of a pattern or practice of discrimination and resulted in large part from a decision to maintain Parma as a virtually all-white community. There is no requirement that such intent be the sole basis of official action, if it is a motivating factor. *Arlington Heights I, supra*, 429 U.S. 252, 265-66.

(c.) The rejection of the Parmatown Woods project was justified, the City contends, because the developer failed to comply with some of the requirements for a building permit. This is technically correct. However, the evidence was clear that strict compliance was not required for other multiple-family developments. The deviations from customary practices in the case of Parmatown Woods consisted of a requirement of unusually strict adherence to the provisions of the Parma Planning and Zoning Code and a departure from the City's normal practice of accommoda-

tion with developers through informal negotiations. Departure from normal procedural requirements was identified by the Supreme Court in *Arlington Heights I, supra,* as a factor to be considered in seeking to learn the intent of a public body. *Id.* at 267. The contrast between producers followed in handling the application of Parmatown Woods and those of Parmatown Gardens and Parmatown Towers, two other multiple-family developments, was particularly striking. Informality and cooperation with the developer (the same developer in each case) were the essence of the attitude of Parma officers and employees in processing the Parmatown Tower and Gardens projects to successful conclusion. Significantly, neither was for low or moderate-income families. The same attitude appears to have prevailed with respect to Parmatown Woods in its early stages. Difficulties began to appear only after Parma residents and officials voiced questions about the development's occupancy and when it was made clear by HUD officials that residents in that project could not be limited to senior citizens or to Parma residents. The district court could properly conclude that the difficulties experienced with the Parmatown Woods project resulted from an intent to exclude minorities. This is particularly so in view of the public statements of two of the highest elected officials which occurred during the period when the application was pending.

(d.) We believe Parma's refusal to complete an acceptable application for CDBG funds presents the clearest evidence of the City's attitude. The very application form which was rejected for failure to include an adequate housing assistance plan revealed the need for low-income housing. The City wanted federal funds. The mayor's testimony is clear on this point. It is equally clear that the City decided to forego such funds for community develop-

ment rather than accept federally assisted housing as part of the package. Of course, there is no general requirement that any community participate in the block grant program. However, in the context of this case, where a desire and need for federal development funds was admitted and no believable explanation for failure to pursue them was given, the district court was justified in finding that the reason for the city's failure to do so was rooted in an intent to exclude minorities which was part of the pattern or practice charged.

(e.) Parma contends that the district court erred in finding support for its conclusion that the City violated the Act in the four land use ordinances adopted by the City. The district court decided that no discriminatory motive was involved in enactment of the ordinances requiring 2½ parking spaces per residential unit and requiring a voter referendum for zoning changes. However, the court found that both had a discriminatory impact. On the other hand, the court determined that the ordinances prescribing height limitations for buildings and requiring voter referendum approval for public or subsidized housing were motivated, at least in part, by a desire to exclude minorities. The general right of local communities to control land use by zoning ordinances and regulations is not an issue in this case. The Supreme Court has upheld this municipal authority against a variety of challenges over the years. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). However, zoning decisions which have a racially discriminatory effect have been held to violate the Fair Housing Act. *City of Black Jack, supra; see Arlington Heights II, supra.* It was not impermissible to hold that Parma's zoning decisions were part of "a pattern or practice of resistance to the full enjoyment" of rights granted by the Fair Housing Act.

The findings of the district court on mixed questions of law and fact and its conclusion that Parma has violated the Act are amply supported by the record. We find no departure from proper legal standards in the determination of Parma's liability. The remedial order will be dealt with separately.

III.

A.

With respect to remedy, Parma asserts that the district court exceeded its authority in "appointing a special master, restructuring Parma's municipal government, supplanting elected officials and depriving its citizens of their cherished right to vote in referendum." In the district court's own words, it formulated a "comprehensive remedial plan" in this case. 504 F.Supp. at 916. Though the plan is comprehensive, and in some respects unique, the question for this court to decide is whether it is a suitable remedy for the violation which was found to exist. As in cases of constitutional violations, courts must carefully tailor the remedy in cases of statutory violations, limiting it to relief necessary to correct the violations. *Resident Advisory Board v. Rizzo, supra,* 564 F.2d at 149. The breadth of the remedial order does not, in itself, indicate that a court has exceeded its authority. As Chief Justice Burger wrote for the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15 (1971):

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
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> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould

each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944), cited in *Brown, II, supra*, at 300.

B.

Our examination of the remedial order leads to the conclusion that most of its provisions do represent a tailoring of relief to correct the statutory violations found by the district court. Injunctive relief is specifically authorized by section 813 of the Act and has been granted in cases involving violations by municipalities. *E.g., Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1038 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). The four-part injunction entered by the district court does no more than prohibit activities of a type which the court has found to violate the Act by making housing in Parma unavailable to persons because of race. The district court did not abuse its discretion in granting this relief.

C.

The affirmative provisions of the remedial order are not as unusual as Parma suggests in its brief. Most, if not all of those provisions have been incorporated in decrees of various courts which have decided Fair Housing Act cases. What is unusual is to find such a wide range of affirmative requirements in a case where the defendant is a political entity. It is common in pattern or practice suits against private defendants to require educational programs for employees and advertising programs to advise the public of the nondiscriminatory policies which will be followed.

E.g., United States v. Youritan Construction Co., 370 F. Supp. 643, 652 (N.D. Cal. 1973), *aff'd in pertinent part*, 509 F.2d 623 (9th Cir. 1975); *United States v. Long*, 537 F.2d 1151, 1152 (4th Cir. 1975), *cert. denied*, 429 U.S. 871 (1976); *United States v. Warwick Mobile Homes Estates, Inc.*, 558 F.2d 194, 196 (4th Cir. 1977). We can see no objection to requiring an educational program to acquaint those officials and employees of the City who are responsible for carrying out the terms of the remedial order of their obligations thereunder. With respect to the requirement of advertising, we have found no case where a similar requirement has been imposed upon a city or other political entity. Unlike realtors and lenders, a city does not ordinarily carry on an advertising program to promote its activities. Nevertheless, on uncontradicted evidence, Parma's reputation as a closed community was found to be widespread in the Cleveland area. The advertising campaign ordered by the court, if of reasonable duration, should correct this image without imposing too great a burden on the City. However, this advertising material may only reflect the official attitude of the City as an equal opportunity housing community. It may not claim to reflect the private attitudes of the citizens of Parma, as suggested by the order. Private attitudes and opinions are not subject to official control.[5] The requirement that Parma

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5. The dissent appears to overlook the limitations which we have placed on the City's duty to advertise. The only concern of this court is with the official actions of the City and its representatives. To the extent these official acts and statements have created a reasonable perception that Parma is officially committed to remaining a community where racial minorities have no opportunity to reside, it was a proper element of the remedy to require that publicity be given to the changed official policy. The dissent refers, with emphasis, to a statement in the district court remedial order that the community be informed that discriminatory practices no longer reflect the attitude of the citizens of Parma. This portion of the district court's order was not approved, and our opinion makes it clear that only the official acts and policies of the City are to be the subject of advertising.

adopt a welcoming resolution is relatively innocuous and fits in with the advertising campaign which we have approved.

The requirements that the City take whatever action may be necessary to permit construction of public housing, adopt a plan to utilize an existing section 8 program and take required steps for submitting an acceptable application for CDBG funds are reasonable. All respond to the needs of Parma as found by the district court and reflect evidence at the remedial hearing concerning the best means of correcting the violations found to exist. However, if the City should adopt a feasible plan to meet its needs for such housing without resort to programs specified in the order, it is to have this flexibility. The order is affirmed as written with this understanding.

The court affirms and strongly endorses the requirement that a fair housing committee be established within city government. This was described by a highly qualified witness, Paul Davidoff, as a major component of the remedial plan offered by the government. If this committee is thoughtfully constituted and functions in the manner envisioned by Mr. Davidoff, much of the tension and resentment which is evident among Parma residents and officials will be dissipated. This committee offers the best hope for a harmonious solution to the problems which this lawsuit has identified.

The requirement that Parma make all efforts to ensure that at least 133 units of low and moderate-income housing are provided each year is premature. Though this figure was suggested by a government witness, the same witness testified immediately thereafter that the fair housing committee might find that a different number of units is required. In setting the 133-unit requirement the district court merely established a threshold figure and recognized

that the ultimate burden of providing low and moderate-income housing in Parma "may indeed lie with the housing development community" rather than the City itself. 504 F.Supp. at 923. The City must take all necessary steps to see that the housing needs as described in the remedial order are met in a timely fashion. However, we believe that no particular number should be required at this time, but that a goal of meeting the need for such housing within a reasonable time should be established by the committee. Accordingly, the provision fixing a specific number of units is vacated.

The district court invalidated only one ordinance, the one requiring all proposals for low-income housing to be submitted to a voter referendum. The court found that this ordinance was racially motivated and that its effect would be to make it impossible to attract any such housing. Though invalidation of an ordinance is a strong remedy, it is not beyond the power of a court where necessary to correct a violation. *E.g., Park View Heights Corp. v. City of Black Jack, supra,* 605 F.2d at 1038. We affirm this portion of the order along with the provision which permits the other three ordinances in question to remain in force except as they apply to low or moderate-income housing. This provision tailors the relief to the violation, and intrudes as little as possible into the authority of the City.

With the exceptions noted we find no abuse of discretion in the provisions of the remedial order discussed to this point, and those provisions are affirmed.

As has been stated, the district court appointed a special master with specified powers and functions. This action was taken by the court upon its own motion. No government witness suggested a need for such an appointment and there was no provision for a special master in the pro-

posed plan initially submitted by the government. The district judge stated that a special master is necessary for the resolution of the litigation to go forward in an orderly fashion. We find no support for this conclusion in the record. The government's chief witness on remedy, Mr. Davidoff, emphasized the necessity of getting the community of Parma involved in the task of making it a city where equal opportunity in housing would be a reality. He ascribed paramount importance to a local fair housing committee authorized to develop, monitor and implement the court's order in this case. Davidoff stated that the "first principle" of planning a solution to a situation such as Parma's is that solutions take time. A different Parma cannot be created immediately by court order. The second principle, he testified "is that of giving maximum freedom to the local jurisdiction to develop its own solution, to try to not take away the basic rights that inhere in local government to develop its plans for its future growth." The imposition of a special master would appear antithetical to the recommendations of this witness. Mr. Davidoff said, "I think that the plan is in Parma's hands, at least in the first stage, according to my set of recommendations." Since the court largely adopted this witness's set of recommendations in its remedial order we can discern no reason for departing from the underlying philosophy of those recommendations which is to give Parma the first opportunity to correct the conditions which were found to violate the Act.

We can understand the district court's apprehension that too much of its judicial time will be taken up with administering details of the plan. We believe, however, that the court will be able to oversee implementation of the plan by working through the fair housing committee and the evaluation committee as suggested by Mr. Davidoff and as provided for in the remedial order.

The appointment of a special master to oversee implementation of a court order by a municipality is an extraordinary remedy. We do not believe that such an appointment would represent the least intrusive method of achieving the government's stated goal in this case of making Parma a community which will offer low-income persons and members of minority groups some choice as to where they will live. The order appointing a special master is reversed.

The partial stay heretofore entered by this court is dissolved. The judgment of the district court is affirmed in part and reversed in part as indicated in this opinion.

MERRITT, *Circuit Judge*, dissenting in part. Judge Lively's opinion goes a long way in bringing order and clarity to this confusing and difficult case, but I do not find satisfactory that portion of the opinion which premises liability on the city's "image" or "reputation" and orders a comprehensive advertising program as a corrective means.

As I understand the court's various holdings, the fact that the city itself refused to plan, develop, sponsor or build public or low income housing is not a basis of liability under the Fair Housing Act. The primary bases of the city's liability, as found by the court, are:

(1) The mayor and certain members of the city council, including its presiding officer, through public statements and conduct, evidenced a general intent to exclude blacks from the city.

(2) In order to carry out this goal, officials of the city interfered in the market for low income housing by refusing to allow either private builders or public agencies such as the Cleveland metropolitan housing authority to supply low income housing within the boundaries of Parma.

(3) With discriminatory intent, these officials interfered with the supply of low income housing by refusing builder's permits for spurious reasons, and they promoted and adopted a policy requiring a city-wide vote by referendum on all local, state or federally subsidized housing.

I agree that the record supports a finding of liability on this basis.

After finding liability, the court then reverses the remedy of the District Court to the extent that it requires the city to develop, sponsor or build housing under the supervision of a special master. The basic remedy imposed by the court against the city is to order the city to stop its unreasonable interference in the market for public and private low income housing. The city and the fair housing committee are required to develop and submit to the District Court a plan outlining what regulation of these markets they consider reasonable and necessary. With all of this I agree.

I also agree with the court that the referendum provisions requiring a city-wide vote on individual housing projects is invalid. First, it seems clear that the effect, as well as the purpose, of this referendum provision is to keep out blacks, a discreet minority with no access to the political process in the City. The City is no more free to inflict deprivation upon this group by popular vote than by legislative act. Second a popular vote is not a reasonable way to adjudicate individuals rights of builders. It is not a procedurally fair method of adjudication because the individual or corporation denied a permit to enter the market is not entitled to a hearing or any explanation for the decision. Third, the record shows that the city does not want blacks, obviously a suspect classification subject to strict judicial scrutiny. There is no way for any rea-

sonably precise analysis to be made of the reasons a particular applicant is denied the right to enter the market when the decision is made by the voting public in referendum. Principles of due process and equal protection, as well as the prohibition against discrimination in housing contained in the Fair Housing Act, combine to prevent adjudication by popular referendum of individual housing construction applications.

My problem with the opinion of the court is that it allows to stand the lower court's finding of liability based upon "the failure of the city council to adopt a resolution welcoming all persons of goodwill to Parma," and the City's "reputation among black residents of the Cleveland area of hostility to racial minorities." (Opinion, p. 21.) In order to remedy these wrongs, the District Court ordered the City to pass a welcoming resolution and adopt a comprehensive advertising program. The District Court in its remedial order provided:

> C. *Fair Housing Resolution* . . . Parma is ORDERED to enact a fair housing resolution *welcoming* persons of all races, creeds and colors to reside in Parma . . . .
>
> D. *Advertisement of Parma as an Open Community* This court has found that Parma has perpetuated a racially exclusionary and discriminatory *image*. In order to eliminate *the perception of Parma in the Cleveland area, and in the minority community of Cleveland in particular, as a closed municipality*, Parma must implement an advertising program *promoting* Parma as an equal housing opportunity community. The purposes of this program are clear: To inform the community that (1) Parma is *seeking to become* an open community; (2) Parma is attempting to expand housing choice for minorities

> in the city; (3) All persons are welcome in Parma; (4) Discriminatory practices which have characterized Parma in the past *no longer reflect the attitude* of the city and its citizens.
>
> Accordingly, it is ORDERED that Parma shall undertake *a comprehensive advertising program in newspapers* which circulate principally in the black community in the region, as well as in the major regional newspapers. The advertising campaign shall be directed at accomplishing the above stated purposes in addition to promoting Parma as a good place for persons of all races to reside. (Emphasis added.)

Our Court's opinion appears to sustain this portion of the District Court's order. Our opinion states:

> With respect to the requirement of advertising, we have found no case where a similar requirement has been imposed upon a city or other political entity. Unlike realtors and lenders, a city does not ordinarily carry on an advertising program to promote its activities. Nevertheless, on uncontradicted evidence, Parma's reputation as a closed community was found to be widespread in the Cleveland area. The advertising campaign ordered by the court, if of reasonable duration, should correct this image without imposing too great a burden on the City. However, this advertising material may only reflect the official attitude of the City as an equal opportunity housing community. It may not claim to reflect the private attitudes of the citizens of Parma, as suggested by the order. Private attitudes and opinions are not subject to official control. The requirement that Parma adopt a welcoming resolution is relatively innocuous and fits in with the advertising campaign which we have approved.

The Court cites no legal authority or persuasive reasons which support a municipal legal duty to adopt a "welcoming" resolution, or a municipal duty to create a particular image or reputation through publicity. How some residents of other suburbs of Cleveland may "perceive" Parma is not relevant to the City's liability. The law must try not to allow these kinds of general "image" and media considerations to direct its course. The federal court system should not get into the business of trying to change or improve its own or anyone else's image—whether Parma, blacks, General Motors or some agency of the government—by ordering the publication of favorable publicity in the press. We are not equipped to change the public's perception of a city by judicial order. Not only does it seem to me a futile exercise; I am unable to square such an order by a federal court with the first amendment.

The order requires officials of Parma, on behalf of the City in its capacity as the representative of its citizens, to affirm a particular belief, to express and "promote" a particular racial "attitude" or political viewpoint—that "discriminatory practices . . . no longer reflect the attitude of the city and its citizens." The order requires them to express publicly an attitude of repentance for their old racial attitudes and to say that they have changed those beliefs. It is a violation of the first amendment for a federal court or other governmental entity to order anyone to express and print in the newspaper a particular racial attitude, political belief or social philosophy, however much most of us may agree with the viewpoint to be expressed. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating Florida law requiring newspapers to grant political candidates right of reply); *Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating New Hampshire's requirement that automobile drivers display

state motto "Live Free or Die" on license plates). The claims of liberty of conscience, thought and speech are given precedence in the Constitution over the claims of equality of opportunity in housing and where the two conflict, as here, the claims of liberty must be satisfied first. The freedom that exists in this country to state beliefs different from those of the prevailing majority gave birth to the civil rights movement. That movement cannot last long if, in the name of equality, it undermines the conditions of liberty which sustain it by requiring others to publish statements agreeing with its position.

Freedom of association is an aspect of freedom of speech and thought. To compel a particular statement about one's philosophy of association seems to violate the concept of free association even more than the Alabama state law requiring disclosure of NAACP membership lists which the Supreme Court invalidated because "compelled disclosure . . . may constitute a restraint on freedom of association." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463-64 (1958). The line between forced association and the elimination of restrictions on the opportunity for blacks and whites to live together in a neighborhood—a distinction the federal housing act and this court are seeking to draw—may be at times a fine line. We do not in the long run foster the goals of association and racial cooperation by ordering cities to state new, and for some controversial, political attitudes.

The Court suggests that the labor law, notice-posting cases provide authority for such a broad publication order, but my review of the cases indicates that courts have studiously avoided making employers or unions do anything other than post notice or state to their employees that they will abide by the collective bargaining requirements of the Wagner Act. NLRB orders that employers go further and publish such statements in company or other publications,

are routinely struck down, *Florida Steel Corp. v. NLRB*, 620 F.2d 79, 83 (5th Cir. 1980), as are orders requiring employers publicly to admit wrongdoing or promise a change of attitude *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 869 (5th Cir. 1966). Judge Learned Hand's comments in an early labor law, notice-posting case have not been overruled and seem equally applicable to the Parma publication order:

> The employer must indeed post a notice that he will conform to the Board's order. . . . But we think that to compel him to say that he will "cease and desist", necessarily imports that in the past he has been doing the things forbidden; indeed we find it hard to see how the contrary can be rationally argued. Forcibly to compel anyone to declare that the utterances of any official, whoever he may be, are true, when he protests that he does not believe them, has implications which we should hesitate to believe Congress could ever have intended. At any rate until the Supreme Court speaks, we will not so construe the statute; nor are we disposed nicely to examine the scruples alleged; too long a history, and too dearly bought privileges, are behind such refusals.

Art Metals Constr. Co. v. NLRB, 110 F.2d 148, 151 (2nd Cir. 1940).

The fact that our Court now limits the publication order to the City of Parma as a corporation does not alter the first amendment violation. In the labor law cases, the publication orders run against the corporation. The first amendment protects corporations. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (invalidating state restriction on political advertising by corporations). Certainly this coverage should include a corporation municipal which is ordered to express a political attitude in its capacity as the representative voice of a community.

MEMORANDUM OPINION OF DISTRICT COURT

(Filed June 5, 1980)

No. C73-439

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

vs.

CITY OF PARMA, OHIO,
Defendant.

BATTISTI, *C.J.*

MEMORANDUM OPINION

On April 27, 1973, the Civil Rights Division of the Department of Justice filed a complaint in this Court, alleging that the City of Parma has engaged in a pattern and practice of racial discrimination in housing in violation of The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 *et seq.*, and furthermore has denied rights granted by the Act to groups of persons.

The government's contention is that Parma, the largest suburb of Cleveland with a population of more than 100,000, has had, and continues to follow, a long standing policy of excluding blacks from taking up residence in any substantial numbers. The government contends that this policy was manifested in a series of actions by officials of the City of Parma which were done with the purpose

and had the effect of perpetuating Parma's virtually all-white character. Stark statistics show that Parma is well over 99.5% white while adjacent Cleveland has a 38% minority population.

The government's evidence focuses on five series of actions taken by Parma officials between 1968 and 1975, all of which are claimed to have inhibited or prevented blacks from moving into Parma and thereby implemented a policy of racial exclusion. The challenged actions include: (1) Parma's refusal to enact a fair housing resolution which would have welcomed "all persons of goodwill" as residents; (2) Parma's consistent opposition to all forms of public and low-income housing; (3) Parma's rejection of a federally-subsidized low-income housing development; (4) Parma's refusal to submit an adequate housing assistance plan in connection with its application for Community Development Block Grant funds; and (5) Parma's passage and application of four land-use ordinances which impose height, parking and voter-approval limitations on housing developments, with the purpose and effect of severely restricting low-income housing opportunities in the City. These actions, individually and collectively, are alleged to have been taken with the purpose and the effect of perpetuating a segregated community.

Parma denies that its conduct had the purpose or effect of discriminating against blacks. The City's basic defense is that its virtually all-white character is the natural outcome of free choice in the housing market. The City claims that the marked absence of blacks is the result of choice influenced by associational preferences, historical and economic factors, and not the result of discrimination in housing. The challenged actions are defended by the City on the ground that they advance legitimate municipal interests and are within the discretion normally afforded to the community.

The issues of racially discriminatory motivation, racially discriminatory effect, and Fair Housing Act violations depend on the evaluation of often merged legal and factual questions. The findings which follow are made from a review of all evidence and applicable law, including judicial notice of certain historical facts found in earlier court decisions or in sources whose accuracy cannot reasonably be questioned. *See* Rule 201(b), Fed. R. Evid. For organizational purposes, the findings are grouped into four major areas:

I. Legal Standards for Determining Violations of the Fair Housing Act;

II. Racial Housing Discrimination in the Cleveland Metropolitan Area, and Parma;

III. Parma's Racially Exclusionary Policies and Practices; and

IV. Violations of the Fair Housing Act.

These findings follow a trial on the issue of liability at which twenty witnesses testified and the depositions of eleven witnesses and over 250 exhibits were admitted into evidence. The remedy issue was pretermitted for a subsequent proceeding if liability were found.

I. LEGAL STANDARDS FOR DETERMINING VIOLATIONS OF THE FAIR HOUSING ACT

The Fair Housing Act was enacted by Congress in 1968. Pub. L. No. 90-284, Title VIII, 82 Stat. 81 (codified at 42 U.S.C. §§3601 to 3631). Its purpose is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. §3601. Enacted pursuant to congressional power under the Thirteenth Amendment, the Act implements a policy of the highest priority—the

replacement of ghettos with truly integrated living patterns. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972). As the Supreme Court has noted, ". . . when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery." *Jones v. Mayer Co.*, 392 U.S. 409, 442-443 (1968).

Like Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, the Fair Housing Act was enacted to ensure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics. *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Congress designed it to prohibit "all forms of discrimination, sophisticated as well as simple-minded." *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974). The Act, therefore, is to be construed generously to ensure the prompt and effective elimination of all traces of discrimination within the housing field. *Trafficante v. Metropolitan Life Ins. Co., supra* at 211-212; *see also Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974).

Section 804(a) of the Fair Housing Act prohibits all practices which make unavailable or deny housing to persons because of race, color, religion, sex or national origin. This broadly drafted section reaches every practice which has the effect of making housing more difficult to obtain on prohibited grounds. *United States v. City of Parma*, 1 EOHC §13,616 (N.D. Ohio 1973); *United States v. Youritan Constr. Corp.*, 370 F.Supp. 643 (N.D. Calif. 1973), *aff'd in relevant part*, 509 F.2d 623 (9th Cir. 1975); *Zuch v. Hussey*, 394 F.Supp. 1028 (E.D. Mich. 1975), *aff'd in relevant part*,

547 F.2d 1168 (6th Cir. 1977) (racial steering); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976) (mortgage red-lining); *Dunn v. Midwestern Indemnity Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979) (insurance red-lining); *United States v. American Institute of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978) (discriminatory practices of appraisers). Even the discretion normally accorded to local zoning officials, *see Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); is to be curbed where "the clear result of such discretion is the separation of low-income Blacks from all White neighborhoods." *Banks v. Perk*, 341 F. Supp. 1175, 1180 (N.D. Ohio 1972), *aff'd in part and rev'd in part without opinion*, 473 F.2d 910 (6th Cir. 1973). Thus, municipal land use practices which make housing unavailable on a prohibited basis violate the Fair Housing Act. *United States v. City of Parma, supra; Accord, e.g., Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (*Arlington Heights II*); *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3rd Cir. 1977), cert. denied, 435 U.S. 908 (1978); *United States v. City of Black Jack, supra.*

Violations of the Fair Housing Act can be established under two different theories. First, policies and practices which are motivated by racial discrimination violate the Act. *See, e.g., United States v. West Peachtree Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971); *United States v. Northside Realty Associates*, 474 F.2d 1164 (5th Cir. 1973), *cert. denied*, 424 U.S. 977 (1976). Second, policies and practices may violate the Act if there is a showing of a racially discriminatory effect, even absent evidence of a racially discriminatory motive. *United States v. City of Parma*, 471 F. Supp. 453 (N.D. Ohio 1979); *Arlington Heights II, supra;*

Resident Advisory Board v. Rizzo, supra; United States v. City of Black Jack, supra; Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979); *Bishop v. Pecsok*, 431 F. Supp. 34 (N.D. Ohio 1976).

Standards covering the scope and nature of the evidence needed to prove a violation under the first theory-racially discriminatory intent-have evolved not only in Fair Housing Act litigation, but also in cases involving alleged violations of the Equal Protection Clause. *See e.g., Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (*Arlington Heights I*); *Columbus Board of Education v. Penick*, ... U.S. ....., 99 S. Ct. 2941 (1979). It is clear that the determination of "whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights I, supra* at 266. To find racial intent, a court must evaluate evidence derived from consideration of numerous factors, including: (1) the discriminatory impact of the policy or practice; (2) the historical background; (3) the "sequence of events leading up to the challenged decisions"; (4) deparatures from "normal procedural sequences"; (5) departures from normal substantive criteria; and (6) legislative or administrative history of the challenged decisions. *Id.* at 265; *Resident Advisory Board v. Rizzo, supra* at 143. In addition, a court can consider whether a defendant adhered to a policy with full knowledge of its predictable segregative effects. *Columbus Board of Education v. Penick, supra* at 2950; *see Dayton Board of Education v. Brinkman*, ... U.S. ....., 99 S. Ct. 2971, 2978 n. 9 (1979); *Personnel Administrator of Massachusetts v. Feeney*, ... U.S. ....., 99 S. Ct. 2282, 2296 n. 25 (1979).

Obviously, very persuasive evidence of racial intent can be found in the statements by decision-makers or their agents attesting to a policy of discrimination. *See, e.g., Arlington Heights I, supra* at 268; *Resident Advisory Board v. Rizzo, supra* at 144; *United States v. Reddoch,* 1 EOHC §113,569 (S.D. Ala. 1972), *aff'd,* 467 F.2d 897 (5th Cir. 1972). But a finding of intent cannot be limited to instances where decision-makers articulate overtly bigoted opinions. Such would reward subtlety and camouflage at the expense of uncovering the underlying motivation. Even though the overt public expression of bigotry has become unfashionable, *see Arlington Heights II, supra* at 1289-1290, racial intent still can be shown by a series of decisions *all* of which have had a segregative effect and result in a cumulation of disadvantage inexplicable on grounds other than an invidious but unstated basis. *See Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

To prove a violation of the Fair Housing Act under the "intent" standard which has emerged, it is not necessary that race be the sole or dominant motive behind the formulation and maintenance of policies and resulting actions. *See Arlington Heights I, supra.* The Fair Housing Act is violated if race was one of the motivating factors behind challenged conduct. *Robinson v. 12 Lofts Realty, Inc., supra* at 1042; *United States v. Pelzer Realty Co.,* 484 F.2d 438, 443 (5th Cir. 1973), *cert. denied,* 416 U.S. 936 (1974). *Smith v. Sol D. Adler Realty Co.,* 436 F.2d 344, 349-350 (7th Cir. 1971). The rationale for not permitting race to be a "secondary" motivation has special force in the public sector. Political decisions inevitably involve the consideration and balancing of numerous competing interests. Indeed, it is the pyramiding of interests which often permits the forging of consensus. Many decisions would not be made, and actions not undertaken, if a particular motiva-

tion were absent. Permitting racial discrimination to be a "secondary" motivation would significantly raise the likelihood that decisions would be reached and actions undertaken on an impermissible basis.

Violations of the Fair Housing Act also can be established under the second theory of racially discriminatory effect. There is nothing in the language of Section 804(a), which prohibits any practice that makes unavailable or denies a dwelling to any person because of race, that requires proof of intent. The "because of race" terminology of Section 804(a) is analogous to that used in Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) (Title VII), which prohibits employment practices which have discriminatory effects. *See Griggs v. Duke Power Co., supra; cf. Board of Education of New York v. Harris,* ..... U.S. ....., 100 S. Ct. 363 (1979) (effects standard applied under Emergency School Aid Act, 20 U.S.C. §1601 *et seq.*). The practical effect of decisions and actions constitutes an appropriate standard under the Fair Housing Act because "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme". *Hobson v. Hansen,* 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson,* 408 F.2d 175 (D.C. Cir. 1969) (*en banc*).

Congress employed broad language in Section 804(a) of the Fair Housing Act in order to ensure that the Act's purpose of providing for fair housing throughout the country would be achieved. To sanction conduct which perpetuates and reinforces discrimination in the housing market, absent some convincing justification, would nullify the congressional goal and thwart the strong national commitment to integrated housing.

Courts which have considered the "racially discriminatory effects" standard under the Fair Housing Act have not

been uniform in defining what proof is required to establish a violation. *Compare Arlington Heights II, supra, with Resident Advisory Board v. Rizzo, supra.* Certainly a *prima facie* case requires proof that challenged policies and actions have a discriminatory effect. However, that alone may not always be sufficient to prove a violation. *See Arlington Heights II, supra* at 1290. A court must be sensitive to at least four other "crucial" factors: (1) the strength of the showing of discriminatory effect; (2) evidence of discriminatory intent; (3) the defendant's interest in taking action complained of; and (4) the nature of the remedy sought. *Id.* To rebut the *prime facie* case of segregative effect, the defendant must prove that its conduct is justified in theory and practice by a legitimate bona fide interest. Also, "the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." *Resident Advisory Board v. Rizzo, supra* at 149.

The government asserts that Parma has violated Sections 804(a) and 817 of the Fair Housing Act under both the "intent" standard and the "effects" standard. Because the government contends that Parma has adhered to a general policy of racial discrimination, the Court must consider the evidence as a whole, as well as in its component parts. The character and effect of a general policy is to be judged in its entirety, and not by dismembering it as if it consisted of unrelated parts. *See Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 699 (1964); *Keyes v. School District No. 1*, 413 U.S. 189 (1973); *Davis v. School District of Pontiac*, 443 F.2d 573, 576 (6th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979). Even intrinsically lawful acts may lose that character when they are constituent elements of an unlawful scheme. *Continental Ore Co. v. Union Carbide & Carbon Co., supra* at 707.

II. RACIAL HOUSING SEGREGATION IN THE CLEVELAND METROPOLITAN AREA AND PARMA.

An extreme condition of racial segregation exists in the Cleveland metropolitan area. *See, e.g.*, this Court's earlier findings in *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 355 F. Supp. 1257, 1159-60 (N.D. Ohio 1973), *rev'd on other grounds*, 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108 (1974), and *Banks v. Perk*, 341 F. Supp. 1175, 1178 (N.D. Ohio 1972), *aff'd in part, rev'd in part on other grounds*, 473 F. 2d 910 (6th Cir. 1973). As this Court has found previously, "Cuyahoga County has the racial shape of a donut, with the Negroes in the hole and with mostly Whites occupying the ring." *Mahaley, supra* at 1260. The "hole" referred to is the City of Cleveland; the ring is the surrounding suburbs. According to the 1970 census, 2,064,194 persons lived in the Cleveland Standard Metropolitan Statistical Area, ("SMSA") of whom 332,614 were black (Gov. Ex. 7). The City of Cleveland itself had 750,903 residents, of whom 287,841 were black (*id.*). Thus, almost 90% of the blacks in the metropolitan area lived inside of Cleveland.

These blacks residing within Cleveland were not dispersed generally. Rather they were concentrated on the east side of Cleveland (i.e. the area east of the Cuyahoga River) (Tr. 405). The relatively small number of blacks who had moved to the suburbs were themselves concentrated in two of the eastern surburbs.[1] The western suburbs were almost entirely white.[2]

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1. In 1970, East Cleveland had a population of 396,600, of which 23,196 were black (Gov. Ex. 8). The black population of this one suburb represented over half of the total number of blacks living in all of Cleveland's suburbs.

2. This pattern is summarized in the following table for areas in Cuyahoga County with more than 25,000 persons in 1970

(Continued on following page)

An examination of 1970 census tracts also highlights the extreme degree of racial segregation in the Cleveland area. Blacks accounted for 16.1% of the Cleveland SMSA population (332,614 of 2,064,194). However, of the 440 census tracts in the Cleveland SMSA, 61 were over 80% black and 313 were over 95% white (Gov. Ex. 29). The predominantly black census tracts are, all located on the east side of Cleveland (*see* census tract map in Gov. Ex. 107).

There is no post-1970 census data yet available, but the experts who testified at trial agree that this pattern of racial segregaton has not changed substantially. Blacks continue to be concentrated primarily on the east side of Cleveland. While there has been an increased migra-

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Footnote continued—

(Gov. Ex. 29E) (and with the figure "a" in the table representing a percentage of black population less than 0.1%):

Area	*Percent Black in 1970*
City of Cleveland	
District I (East Side)	10.9%
District II " "	78.4%
District III " "	54.2
District IV (West Side)	1.4
District V " "	.2
District VI " "	2.7
Eastern suburbs:	
Cleveland Hts.	2.5
East Cleveland	58.6
Euclid	.4
Garfield Hts.	4.3
Maple Hts.	2.0
Shaker Hts.	14.4
South Euclid	.1
Western suburbs:	
Brook Park	.3
Lakewood	a
North Olmstead	a
Parma	a
Parma Hts.	a

A map showing the location of these areas (Gov. Ex. 29E) is attached as Appendix I.

tion of blacks into some of the eastern suburbs, there has been little movement of blacks to the west side of Cleveland and almost none to the western suburbs (Tr. 153, 927).

Parma is the largest of Cleveland's suburbs and is located to the south of Cleveland's west side. It is a heavily working-class community with 37.6% of its employed residents being blue collar workers (*see* table 1 in Gov. Ex. 107). Parma's median family income and residential home value are slightly above the average for the Greater Cleveland area (*id.*). About 19% of Parma's residents live in apartments (Gov. Ex. 25).

Parma is also virtually all-white. In 1970, Parma had 100,216 residents, of whom only 50 were black (Gov. Ex. 7). Throughout its development and growth, very few blacks have lived in Parma, as is shown in the following table (Gov. Ex. 3, 4, 5, 6 and 7):

Year	*Population of Parma*	*Number of Black Residents*
1930	13,890	4
1940	16,365	2
1950	28,897	17
1960	82,845	132
1970	100,216	50

This has occurred even though there was a pronounced increase in the numbers of blacks living in the Cleveland metropolitan area between 1930 and 1970.

As the preceding table indicates, Parma developed basically after the Second World War with its population more than tripling between 1950 and 1970. After World War II, many people who had lived in both the east and west sides of Cleveland moved to Parma and other Cleveland suburbs (Tr. 158, 711, 952). They took advantage of the low down-payment and mortgage policies of the Vet-

erans Administration (VA) and the Federal Housing Administration (FHA) (Tr. 950-952), and found jobs as many employers left Cleveland for Parma and other suburbs (Gov. Ex. 23; Tr. 946-948). Although the growth of Parma has slowed in recent years, people continue to move there from the east and west sides of Cleveland (Gov. Ex. 28).

There is no accurate data available on the present racial composition of Parma. The Mayor of Parma, John Petruska, testified that he believed that Parma's total population has increased since 1970, and that there are now over 100 black families living in Parma (Tr. 1361). The Mayor's estimate of the number of black families may be exaggerated as there are only 36 black students in the Parma School District (Gov. Ex. 2), which includes the cities of Parma, Parma Heights and Seven Hills (Tr. 92). However, even if the Mayor's estimate is correct, the black population in Parma would still be well below 1%. Significantly, there are many more blacks who work in the Parma area than who live there. In 1977, large employers in the Parma area filing reports with the Equal Employment Opportunity Commission employed 1323 blacks, which was 6.3% of their total employment (Gov. Ex. 27).

Throughout this litigation, Parma's principal contention has been that the racial segregation in the Cleveland metropolitan area generally and in Parma cifically is not a result of racial discrimination. Parma claims that the housing segregation is a natural phenomenon caused by economics and by the free residential choice of blacks and whites to live with people of common backgrounds (ethnicity). For these reasons, Parma asserts that blacks do not want to live in Parma or indeed anywhere west of the Cuyahoga River, and, therefore, that none of Parma's actions could possibly have had the effect of excluding blacks.

The proposition that the Cleveland metropolitan area and Parma became racially segregated solely as a result of associational preferences and economics, and not because of racial discrimination, is refuted overwhemingly by the evidence in this case. The proposition is also contrary to notorious and judicially-noticed facts about discrimination in the private and public housing markets.

A. *The Dual Housing Market*

The black ghetto on the east side of Cleveland was created and has been maintained by a series of systemic and pervasive practices of private and public discrimination. Recounting this history does not make pleasant reading, and a brief summary will suffice.

Racial segregation in the Cleveland area did not begin until the turn of this century (Tr. 151-153). In the late 1800's small black "settlements" had developed in the east and west sides of the city, and in the western suburbs as well (Tr. 910-911, 928-930). As blacks began to move to Cleveland in greater numbers in the early 1900's, a shortage of housing developed, and they were confined to an area on the east side called the "Roaring Third," or "Darkie Town." (Tr. 151-153). This area continued to expand as more blacks moved to Cleveland. The small west side enclaves, however, did not expand because additional blacks were not allowed to reside there (Tr. 931-932). In certain areas, blacks were not even allowed to walk (Tr. 151-153).

Following the Second World War, blacks moved to Cleveland in huge numbers, and the black population grew from over 80,000 in 1940 to over 280,000 by 1970 (Gov. Ex. 4, 7). They settled on the east side of Cleveland, while hundreds of thousands of whites moved out and settled in the suburbs. Blacks settled on the east side because they

had no choice; other areas of the city and the suburbs were off-limits.

Blacks were confined to the east side by a confluence of pervasive acts of public and private discrimination, the most significant of which are discussed below:

1. Until 1950, the consistent policy of the FHA and VA was to prevent blacks from buying homes in white neighborhoods (Gov. Ex. 9, pp. 43-47; Tr. 765, 938).[3] For example, the FHA Underwriting Manual stated that "the infiltration of inharmonious racial and nationality groups" was "adverse" to neighborhood stability.[4] Underwriting agents were warned to deny insurance to "incompatible social and racial groups" because "change in the social and racial occupancy generally contributed to instability and a decline in values."[5] The agencies strongly encouraged private racially restrictive covenants to maintain the racial homogeneity of neighborhoods.[6] And, to assure "sound business principles," blacks were not allowed to participate in many aspects of the agencies' single-family housing programs.[7] The agencies also "generally withheld insurance from existing housing in central city areas" because those

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3. This Court and other courts have made findings concerning the federal agencies' discriminatory practices. *See e.g., Reed v. Rhodes*, 422 F. Supp. 708, 788-789 (N.D. Ohio 1976), *aff'd*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, ... U.S. ....., 48 U.S.L.W. 3600 (1980) (No. 79-804). *Evans v. Buchanan*, 393 F. Supp. 428, 434-435 (D. Del. 1975) (three-judge court); *Oliver v. Kalamazoo Bd. of Educ.*, 368 F. Supp. 143, 182-184 (W.D. Mich. 1973), *aff'd*, 508 F. 2d 178 (6th Cir. 1974).

4. *FHA Underwriting Manual* §310 (1938), quoted in C. Abrams, *Forbidden Neighbors* 230 (1955).

5. *FHA Underwriting Manual* §233 (1936) and §937 (1938), quoted in C. Abrams, *supra* at 231.

6. *FHA Underwriting Manual* §930(3)(g)(1938), quoted in *U.S. Comm'n on Civil Rights, Federal Policy and Equal Housing Opportunity* 734 (1971).

7. *See, e.g.*, M. Gelfand, *Nation of Cities* 220 (1977)

areas "occupied largely by minority groups had an unfavorable economic future".[8] "For a period approaching 20 years, the Federal government, through the FHA was the leading exponent of racial discrimination in housing and residential segregation." *Reed v. Rhodes*, 422 F. Supp. 708, 789 (N.D. Ohio 1976), *aff'd*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, ... U.S. ....., 48 U.S.L.W. 3600 (1980) (No. 79-804).

2. Following the FHA lead, racially restrictive covenants developed in the Cleveland area (Tr. 938). Although judicially unenforceable after 1948, they continued to be "viewed as a cloud on the title and excepted by title companies in their policies, at least until 1969." *Reed v. Rhodes, supra* at 789.

3. Yielding to public opposition, the Cuyahoga Metropolitan Housing Authority discriminated in its site and tenant selection practices and contributed to residential segregation in the Cleveland area. *Banks v. Perk, supra.*

4. Developers of federally subsidized housing generally were prevented from building (except in Cleveland's east side) because of opposition based on fears that this would bring blacks into white neighborhoods (Tr. 782-784, 790-794, 805).

5. Many real estate brokers dealing with housing in white areas refused to accept prospective black buyers (Tr. 259-260, 695-696). Indeed, until 1950 the Code of Ethics of the National Association of Real Estate Brokers stated: "A Realtor should never be instrumental in introducing into a neighborhood a character of property or

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8. Statement of HUD Secretary George Romney in *Equal Educational Opportunity: Hearings Before the Senate Select Comm. on Equal Educational Opportunity*, 91st Cong. 2d sess. 2353, 2755 (1970).

occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood."[9]

6. Banks, savings and loans, and insurance companies "red-lined" black and integrated neighborhoods, a practice which has not ceased in Cleveland (Tr. 158-159, 264, 700, 938-940, 948-949, 973-974; Gov. Ex. 9, pp. 25-26). And, until enjoined in 1977,[10] the American Institute of Real Estate Appraisers warned against the adverse effects of the "infiltration of inharmonious racial groups" because home values "change when people who are different from those presently occupying an area advance into and infiltrate a neighborhood" and "problems associated with minority group segments of the population can hinder community growth."[11]

7. Beginning in the mid-1950's, there was an increase in the employment of blacks in the west side and in the western suburbs. Many of these people wanted to live close to their work (Tr. 268; *see also* Gov. Ex. 27). However, most were unable to find homes because of private refusals to sell and because of the inability of east side brokers to get listings in the west (Tr. 259-260, 264, 266, 268).

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9. National Ass'n of Real Estate Brokers, *Code of Ethics* (Art. 34, Pt. III), cited in R. Helper, *Racial Policies and Practices of Real Estate Brokers* 201 (1969).

10. *See United States v. American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977).

11. These portions of AIREA's text and basic manuals are quoted in Bradford, *An Analysis of Underwriting and Appraisal Practices and Their Impact on Credit Availability*, 3 *Real Est. Issues* 1, 4-5 (1978). Whites living in or near areas of minority concentration in Cleveland also could not get loans because of red-lining (Tr. 973-974) and this accelerated the movement of whites to the suburbs (Tr. 158-159).

8. There has been, and to a large extent there still is, a dual market in the real estate business. Black realtors were denied membership on the real estate board (Tr. 267), access to multiple listing services (Tr. 729, 941-942), and cooperation with white realtors (Tr. 695-696). As a consequence, black brokers lacked knowledge of listings in the west side of the Cleveland metropolitan area and could not show black clients housing prospects there (Tr. 703). Furthermore, racial steering by brokers had been, and continues to be prevalent (Tr. 942).

9. In Parma and other western suburbs, white and black brokers were unable to find housing for black clients. When these brokers were able to discover listings, homeowners either refused to deal with them (Tr. 253-260) or refused to sell to their black clients (Tr. 259-264, 349-350). In Parma, as in other areas, there were rock-throwing incidents when a white family placed its home on the open market (Tr. 350). Other instances of hostility and physical abuse marked the reaction of residents of white areas when it was thought a black might move in (Tr. 349-352, 769-770, 943).

B. *"Associational Preference" Hypothesis*

In the face of overwhelming evidence of racial discrimination, Parma insists that the extreme racial segregation which exists in the Cleveland area actually is caused by the free associational preference of whites and blacks. Under this theory, ethnicity[12] rather than race

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12. Dr. Bonutti, Parma's expert witness, defined an ethnic as any person who feels part of a subcultural group emphasizing a language, religious, and cultural difference from those of the main culture of the United States (Tr. 874). Dr. Bonutti contends that almost everybody in the United States is an ethnic". (Tr. 875). Dr. Bonutti's definition of "ethnicity" is certainly

(Continued on following page)

is considered to be the principal motivating factor influencing decisions on residential location. Parma's contention is that racial segregation is nothing more than a manifestation of a broader ethnic segregation.

The underpinnings of this hypothesis are rooted in historical immigration and settlement patterns. During the 19th century and continuing until 1924, white ethnic groups immigrated to Cleveland (Tr. 880-883). Being poor immigrants, they grouped together in various ethnic enclaves in Cleveland's poorest neighborhoods (Tr. 884-890). Hostility existed between the various ethnic groups, especially between the old established groups and the newly arrived ones (Tr. 140-142).

As its economic condition improved, each ethnic group moved out of the poorer ethnic enclaves and into the suburbs (Tr. 890-891, 901-907). Blacks began to settle in Cleveland after World War II in poor sections on the east side vacated by earlier ethnic immigrants (Tr. 883, 893-894). The economic condition of Cleveland's blacks has improved only recently, and blacks have now begun to move out to the eastern suburbs.

Parma's basic explanation for this migrational pattern depends on the concept of an "ethnic corridor", by which identifiable ethnic groups engage in unidirectional movement from the City to the suburbs, following established traffic arteries or roadways (Tr. 908). Development of these corridors is frustrated by natural barriers such as lakes and rivers, and man-made barriers such as industrial

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Footnote continued—

not a model of clarity. He claims that ethnicity is a subconscious state apparently transmitted by parents, which remains with the individual even when expressly rejected. It is "the element which creates our own or enforces the type of personality we have, the type of relationship we lay [sic] with others." (Tr. 875).

parks and freeways (Tr. 907-909). Utilizing the "corridor" concept, Parma argues that the black settlement and migration in the Cleveland area merely follows the same basic pattern that characterized the migration of other ethnic groups: from a heavy concentration in the inner city to the suburbs via the corridor (Tr. 901-904). Like whites, blacks prefer to be in the neighborhood of the same ethnic background (Tr. 915). The black corridor moves from the east side of Cleveland into East Cleveland, and is now moving towards other eastern suburbs such as Maple Heights and Bedford Heights (Tr. 890-893). Dr. Bonutti, Parma's expert, does not foresee any significant movement of blacks to the west side or to any of the western suburbs (Tr. 914-915) because the Cuyahoga River acts as a barrier to migration (Tr. 907).

The Court finds Parma's "associational preference" hypothesis, with the accompanying "corridor" theory, to be seriously flawed both in terms of logical inference and empirical validity. Perhaps most significantly, it is impossible to attribute racial segregation to the free associational choice of blacks when free choice has never existed. Dr. Bonutti admitted the existence of discrimination against blacks in the housing market and asserted that this simply reflected traditional hostility experienced by ethnic groups settling in a new area. At one point, Dr. Bonutti testified, "there is no question that there is a lot of discrimination. And it's not only discrimination against blacks. It's discrimination that is applicable to all groups that came here." (Tr. 932). Parma's expert further acknowledged the continued existence of many of the discriminatory practices in the housing market (Tr. 938-949; *see* pp. A53-A57, *supra*), and admitted that this discrimination is a factor which influences existing residential patterns (Tr. 945-946). To suggest that associational preferences, rather than

these practices of discrimination, are the major causes of segregation would not only be contrary to the evidence, but would also place this Court in conflict with the judgment of the State of Ohio (Gov. Ex. 9, p. 48), the judgment of Congress when it passed the Fair Housing Act, *see e.g.*, 114 Cong. Rec. 2278 (1968) (statement of Senator Mondale); *id.* at 9563 (statement of Representative Celler), and the judgment of the Executive branch, *see, e.g., Evans v. Buchanan, supra* at 434 n.10 (citing statement of President Nixon).

While the evidence of housing discrimination against blacks is overwhelming, Parma suggests that this is a "natural" phenomenon because discrimination in housing also confronted earlier ethnic groups when they settled in the Cleveland area. This argument makes the erroneous assumption that ethnicity is equivalent to race. Nowhere is this supported in the record. Indeed, the attempt to categorize race as a subset of ethnicity ignores the one crucial characteristic that distinguishes blacks from white ethnics: color. In addition, the argument that discrimination is "natural" merely means that it has existed in the past. But neither the present nor the future can be burdened by prior injustices based on racial or national bigotry.

The "associational preference" by hypothesis also fails because it is simply not plausible to believe that the supposed preference of blacks to live in black neighborhoods would subordinate people's desire to lead better lives. Dr. Bonutti admitted that blacks have the same aspirations as anyone else (Tr. 969). He also conceded that employment and housing conditions are much worse in the black east side ghetto than in the western suburbs (Tr. 946-950). And, as Dr. Campbell, the government's expert stated, and as the Court is well aware, there are areas in the ghetto which look like bombed-out cities (Tr. 219-220).

Parma would have this Court believe that blacks prefer the life of the ghetto with its attendant filth, degredation, and crime to the life of suburbia because they do not wish to live in white or integrated neighborhoods. For substantiation, the City relies on testimony from Dr. Bonutti that is based on two studies, neither of which is of probative value.[13] The Court finds no evidence to support Parma's contention that blacks freely choose to reside in the ghetto solely in order to reside with fellow blacks.[14] The record clearly refutes such a position (*e.g.* Tr. 221, 703-705). Furthermore, the contention posits a degrading racial hypothesis which this Court does not believe and will not make.

Parma's "ethnic corridor" theory also does not explain why blacks only recently began moving to some of the eastern suburbs and have not even begun to move to the western suburbs. The explanation provided is that the "corridors" take time to develop, and are dependent on the improvement of economic conditions of the ethnic group. Blacks, who settled in Cleveland after white ethnic groups and who are relatively disadvantaged economically, are therefore last in time and money when it comes to the development of a corridor. Additionally, it is argued that a corridor will not develop unless the group is sizable.[15]

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13. Dr. Bonutti erroneously attempts to rely on a study by Father Navins. However, that study does not deal with the issue of whether blacks desire to move out of their neighborhoods (Tr. 945, 975). He also relies on a simple quote concerning a poll discussed in a study by Edward Banfield which does not deal with Cleveland (Tr. 975).

14. There is some evidence indicating that blacks are fearful of moving to the white suburbs because of hostility on the part of some whites (Tr. 227). This is merely another manifestation of the discriminatory environment which has confronted blacks in the Cleveland area.

15. Dr. Bonutti is unable to give a precise figure regarding the size that would enable a corridor to form. The minimal number appears to be ten thousand (Tr. 901).

However, at least two of the factors believed to contribute to the development of a corridor—size and time—have existed for many decades with respect to blacks. There were almost 35,000 blacks living in Cleveland in 1920 (Gov. Ex. 3) and over 85,000 blacks living in Cleveland before World War II (Gov. Ex. 4). If Parma's "corridor" theory were true, many of these early black settlers, their children and grandchildren would have moved to the suburbs, but as Dr. Bonutti admitted, they have not (Tr. 925).[16]

Parma offers no convincing explanation as to why no black "corridors" have developed, or will develop, in the direction of the western suburbs. Dr. Bonutti claims that geographic barriers—the Cuyahoga River, freeways, industrial sites—inhibit the development of such corridors (Tr. 907). But while there is no question that geography influences residential development, the record is replete with evidence of white ethnic groups which have jumped spatially or have dispersed when confronted with barriers to expansion (Tr. 958-965). No reason is proffered why this did not occur with blacks.

Not only did a corridor not develop from Cleveland's east side to the west, but black enclaves in the west side did not expand either. In the late 1800's, several black neighborhoods had developed on Cleveland's west side and in the western suburbs (Tr. 928-930). Unlike white ethnic enclaves nearby, they never developed "corridors" to places like Parma (*id.; see also* Tr. 690-700). Parma claims that this occurred because the neighborhoods were "well-defined" (Tr. 929) and not very large. The reason for the

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16. There are many fourth and fifth generation blacks in Cleveland, but few have moved to the suburbs. This is unlike the Appalachians who settled in Cleveland after the post-World War Two influx of blacks, but who have moved to the suburbs to a much greater extent (Tr. 201).

lack of expansion of these well-defined, small neighborhoods becomes clear only when it is realized that blacks were not allowed to settle around them (Tr. 931-932). It is also clear from the record that there has been much greater resistance to black migration in the west than in the east (*e.g.*, Tr. 782-784, 260-264).

Finally, Parma's "ethnic corridor" theory is greatly exaggerated. It is true that ethnic groups lived in "urban villages" before World War II, partly because of choice and partly because of discrimination (Tr. 141-142). However, as the government's expert, Dr. Campbell, explained, every ethnic group except blacks is now dispersed throughout the Cleveland metropolitan area (Tr. 147, 148, 164-168; *see also* Gov. Ex. 114B, 120). If white "ethnic corridors" exist, they cannot readily be found. Dr. Bonutti admitted on cross-examination that each white ethnic group is dispersed throughout the suburbs (Tr. 958-966).[17] Heavy concentrations of individual white ethnic groups do not exist in either the City of Cleveland or in the suburbs (Tr. 956). In fact, there is only one census tract in the entire Cleveland area in which a single white ethnic group accounts for a majority (Tr. 955). In Parma itself, there are substantial numbers of almost every ethnic group except blacks (Tr. 148). As Dr. Campbell stated, "[I]n all these urban villages or ghettos, if you want, there were entrances for all of the people but there were no exit signs for the blacks and no exits on the west side." (Tr. 221-222).[18]

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17. Even Dr. Bonutti's own experience is contrary to his theory. He is of Slovenian ancestry and immigrated to the United States in 1950 (Tr. 858-860). He settled in an area of Slovenian concentration because he didn't speak English and had no friends in Cleveland. He now lives in Pepper Pike, an exclusive area outside of the Slovenian "corridor" (Tr. 921-924).

18. Former Cleveland Mayor Carl Stokes described the situation more colloquially: blacks have not crossed the Cuyahoga River—and "not because they couldn't swim." (Stokes dep. 75).

Perhaps the most fundamental flaw in the "associational preference" theory, with its heavy reliance on the concept of "ethnicity", is the effort to assume that race is identical to ethnicity. The fact remains that blacks are distinguishable from other groups not on the basis of religion, language, or national origin, but rather on the basis of color. Parma's entire corridor theory assumes a monolithic ethnic black culture which in fact does not exist.

C. Parma's "Economics" Explanation

Parma's other explanation for racial segregation is economics. However, a review of census data for the Cleveland Metropolitan area reveals that economics has little to do with racial segregation. In 1970, Shaker Heights, the wealthiest suburb in the Cleveland area (*see* table in Gov. Ex. 107), had a median family income of $19,918 and a median home value of $41,814 (*id.*). Parma, on the other hand, had a median family income of $12,425 and a median home value of $24,079 (*id.*). But Parma is virtually all-white, while Shaker Heights is one of the only integrated suburbs in the Cleveland area. In 1970, less than 0.1% of Parma's residents were black, compared to 14.5% in Shaker Heights (*id.*).

A more systematic examination of the relationship of economics and other factors to residential segregation in the Cleveland area was done by Dr. John Kain, an expert witness for the government. Dr. Kain's analysis builds upon the work of Dr. Karl Taueber. Using 1960 census data, Dr. Taueber had found that only a small fraction of the intense amount of racial segregation in the Cleveland area could be explained by the differences in income between blacks and whites (Tr. 379-381). Dr. Kain's study differs from Dr. Taueber's in that more recent census data (1970) is used and household characteristics (family type,

age of household and family size) are considered as well as income (Tr. 384-385). Testing the theory that the socio-economic characteristics of the black population are capable of explaining the concentration of blacks within particular neighborhoods in the Cleveland area, Dr. Kain found that if residential location were based solely upon these socio-economic factors, substantial numbers of blacks would live everywhere in the Cleveland metropolitan area (Tr. 408; Gov. Ex. 29).

Dr. Kain found a dramatic difference between the actual racial distribution in the Cleveland area and the distribution that would have resulted from socio-economic factors. As noted earlier, 61 of the 440 census tracts in the Cleveland SMSA were over 80% black in 1970, and 313 census tracts were over 95% white (*see* p. A51, *supra; see also* Tr. 408-409). However, if residential location were determined by income and household characteristics, no census tract would have been more than 60% black, only one tract would have been in the range 50-59% black, no tract would have been less than 5% black, and most census tracts would have been 10-20% black (Tr. 409; *see* Gov. Ex. 29C).

A comparison of the actual population of blacks in specific areas with the expected population in those areas if residential location were determined by income and household characteristics also was undertaken. The findings are summarized in the following table (Gov. Ex. 29F) ("a" means less than 0.1% blacks):

Actual and Predicted Percentage of Black Population in Selected Geographical Areas in Cleveland SMSA

Area	*Percent Negro*	
	Actual	*Predicted*
Brook Park	.3%	13.3%
District I (Cleveland)	10.9	16.7
District II (Cleveland)	78.4	31.2
District III (Cleveland)	54.2	20.8
District IV (Cleveland)	1.4	20.2
District V (Cleveland)	.2	15.8
District VI (Cleveland)	2.7	14.3
Cleveland Heights	2.5	11.4
East Cleveland	58.6	19.3
Euclid	.4	18.1
Garfield Heights	4.3	13.7
Lakewood	a	13.0
Maple Heights	2.0	13.6
North Olmsted	a	12.6
Parma	a	12.7
Parma Heights	a	12.1
Shaker Heights	14.4	8.5
South Euclid	.1	11.2
Balance of Cuyahoga	2.6	14.9
Mentor	.5	13.7
Geauga County	1.2	13.8
Balance of Lake County	1.6	14.0
Medina County	.8	14.7

This table shows that if income and household characteristics determined residential location, the Cleveland metropolitan area would be racially integrated with a substantial representation of blacks in every suburb. Parma itself would have been 12.7% black in 1970, or three hundred and twenty times the actual percentage (.04%).

Using the same techniques to examine the relationship of income and household characteristics on the residential distribution of white ethnic groups yielded results quite different from those observed for blacks (Tr. 413). Foreign stock individuals[19] are dispersed widely throughout the Cleveland metropolitan area. Using his basic model ("Model I"), Dr. Kain found that, with one exception, the actual distribution of foreign stock persons was close to the distribution that would be expected based on income and household characteristics (Tr. 413-415). The one exception was the area on the east side of Cleveland where blacks are concentrated most heavily (*id.*). Dr. Kain, using an alternative model ("Model II") in which his calculations were limited only to the white population (Tr. 413-417), found that the match between the actual and predicted distributions of white ethnic groups was improved (Tr. 425). These results are summarized in the following table (Gov. Ex. 29F):

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19. The census identifies "foreign stock" as people who are foreign born or who had a foreign born parent (Tr. 413).

Actual and Predicted Percentage of Foreign Stock Population in Selected Geographical Areas in Cleveland SMSA

	Percentage Foreign Stock		
		Predicted	
Area	*Actual*	*Model I*	*Model II*
Brook Park	20.8%	19.0%	21.7%
District I (Cleveland)	35.4	27.1	29.4
District II (Cleveland)	8.5	21.6	7.6
District III (Cleveland)	20.1	24.7	15.8
District IV (Cleveland)	27.8	24.0	29.2
District V (Cleveland)	37.5	27.0	31.6
District VI (Cleveland)	31.1	25.9	29.3
Cleveland Heights	36.7	28.8	31.6
East Cleveland	15.9	24.4	15.6
Euclid	33.1	27.2	30.9
Garfield Heights	35.9	26.7	29.6
Lakewood	28.3	27.9	31.8
Maple Heights	33.3	25.8	29.2
North Olmstead	24.0	22.6	25.8
Parma	36.1	25.7	29.3
Parma Heights	32.6	26.2	29.6
Shaker Heights	28.3	30.4	29.1
South Euclid	45.8	30.0	33.4
Balance of Cuyahoga	39.9	35.4	38.9
Mentor	14.4	22.8	26.1
Geauga County	20.4	21.7	24.7
Balance of Lake County	21.7	23.1	26.2
Medina County	12.8	22.9	26.5

Finally, Dr. Kain looked at Parma and compared the actual proportions of specific ethnic groups with the predicted proportions based on income and household characteristics. He found a very close relationship (Tr. 428-430):

Actual and Predicted Percentages of Specific Foreign Stock in Parma

Group	*Actual*	*Predicted*
Polish	5.4%	4.4%
German	3.8	2.7
Czech	5.6	4.2
Austrian	2.7	2.4
Hungarian	2.0	2.6
Russian	3.1	2.3
Italian	3.7	5.0
Other	7.7	10.8

From these analyses, Dr. Kain concluded that income and household characteristics substantially explained the residential distribution of white ethnic groups, but not of blacks. Thus, another factor has operated to confine blacks, but not white ethnic groups, in certain areas. Based upon his extensive knowledge of housing markets and urban development, Dr. Kain concluded that this factor is racial discrimination (Tr. 432; Gov. Ex. 29).

Parma's attempt to rebut Dr. Kain's analysis involved three criticisms of Dr. Kain's study: first, that a different mathematical model should have been used (Tr. 1021-1023); second, that important variables were omitted from, and should have been used in, the study (Tr. 1028-1043); and third, that statistical tests showed that no conclusions could be drawn from Dr. Kain's observed results (Tr. 1044-1068).

The Court finds the criticisms to be largely without factual foundation.[20]

Dr. Ramsey, Parma's expert on econometric models, testified solely on the validity of Dr. Kain's models. However, the alternative mathematical model urged by Dr. Ramsey, to his knowledge, has never been used in any published works in the area of demographic patterns by race or ethnicity (Tr. 1076). In fact, Dr. Ramsey has never studied housing segregation, demographic patterns, or any other subject dealing with an aspect of racial discrimination (Tr. 1073). In any event, the invalidity of the central concept of Dr. Ramsey's model-clusterings due to ethnicity—has already been addressed (*see* pp. A53-A64, *supra*). Dr. Kain's models substantially account for existing white ethnic clustering, but not for black residential patterns.

The important variables which Dr. Ramsey believes were erroneously omitted from Dr. Kain's study—wealth, religion, occupation, lifestyle (Tr. 1034)—were omitted either because the variables had not been employed and tested before, because the data did not exist (Tr. 1090-1091, 1099-1103), or because the variable is not truly significant (Tr. 1091-1098).

Finally, the statistical tests performed by Dr. Ramsey in an effort to discredit Dr. Kain's study were sometimes misleading or meaningless (Tr. 1105-1112). Some of the

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20. The Court is well aware of the limitations inherent in statistical analysis. Areas of difficulty include a not totally satisfactory data base, somewhat pliable explanatory concepts (i.e. ethnicity), the multiplicity of factors which influence individual residential choices, and the inability to conclusively isolate controlling factors affecting choice. There is, however, no requirement that statistical evidence amount to proof to a mathematical certainty. While deficiencies may detract from the value of statistical evidence, the evidence may still be probative. *Detroit Police Ass'n v. Young*, 608 F.2d 671, 687 (6th Cir. 1979).

tests were performed erroneously (Tr. 1117-1124), and other tests were conducted without confirming necessary statistical assumptions (Tr. 1130-1132). Finally, some of Dr. Ramsey's statistical tests produced results consistent with Dr. Kain's conclusions (Tr. 1136-1144, 1125-1126).

Based on the record, the Court finds that the racial segregation in the Cleveland area cannot be attributed to either associational preferences or economics. The Court finds that a principal cause of the housing segregation is the past and present discrimination suffered by blacks.

III. PARMA'S RACIALLY EXCLUSIONARY POLICIES AND PRACTICES

As a result of the long-standing practices of private and public discrimination described earlier, the western part of the Cleveland metropolitan area is considered by most black people as hostile territory and a place where blacks simply are not welcome (Tr. 210, 225-226, 268, 269, 344-345, 351, 702, 709-711; Stokes dep. 49-50). Parma shares this image of exclusion based on race; it has the reputation in the black community, among realtors and brokers generally, and with Parma residents of being a city reserved for whites and opposed to racial integration.[21] This is the undisputed testimony of Parma residents (Tr. 86, 109, 118-119), of former mayor of Cleveland, Carl Stokes (Stokes dep. 21, 47-48), of the present mayor of neighboring Parma Heights, Paul Cassidy (Tr. 1426-1428), of federal housing officials (Tr. 269), of experienced black and white real estate brokers (Tr. 710-711, 344-345), and of the government's expert, Dr. Campbell (Tr. 225-226).

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21. This Court is well aware that in many instances, reputations are not well deserved. But the existence of an image, even if unjustified by the underlying facts, is a relevant and important factor in explaining residential choice. Additionally it forms part of the historical background against which evidence must be weighed.

Parma's exclusionary image differs in degree from other western suburbs. Parma is generally considered to be the suburb that is most hostile to blacks (Tr. 269, 345; Stokes dep. 48), and is a "symbol" of resistance to integration (Tr. 345).[22] According to a former Councilman-at-large of the City, "Parma has a national reputation as being a segregation community" (Sands dep. 28).

A city's reputation can be created and affected by the publicly-expressed attitudes of its leadership. Racial statements made by Parma's elected officials contributed to the perpetuation and intensification of this image of exclusion based on race (Tr. 269, 711; Stokes dep. 41-46). It takes little education or sensitivity to perceive the attitude reflected by City Council President Kuczma when he stated "I do not want Negroes in the City of Parma." (Gov. Ex. 118). His remarks were made at a public meeting and were publicized widely in the press and television. They served to reinforce Parma's reputation as a place that "did not want blacks to live there . . ." (Stokes dep. 43-48; *see also* Tr. 711).[23] Also publicized and contributing to the exclusionary image was Parma Mayor John Petruska's assurance that the "entire east side of Cleveland" would not be moving into Parma (Gov. Ex. 119; Petruska dep. 108). The statement was made at a public meeting on a federally subsidized low-income housing proposal, and followed a discussion which touched on racial concerns (Petruska dep. 108). The sug-

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22. The Court does not find, based on the present record, that Parma is in fact the western suburb most hostile to blacks. Any such finding would require a comparative analysis of the relevant suburbs.

23. Mr. Kuczma made no attempt to retract his statement (Kuczma dep. 132) and realized that it would have a lasting effect. He testified: "Even if the newspaper printed a retraction in bold one-inch letters across their next issue, the impact would be there" (*id* at 109).

gestion that the remark was referring to general housing conditions as opposed to blacks is not credible.

Mayor Petruska's remarks were not limited to public meetings in Parma. His nationally televised statement that Parma was integrated when it had three black families (Gov. Ex. 30, p. 14) was widely known and is still remembered for the racial attitude it expressed.[24] As former Mayor Carl Stokes noted afterwards (Stokes dep. 44-45, 46):

> It was something that is tragic in its fact, in its being a fact, and yet a person literally saying out loud something that so unconsciously by itself reflects the actuality of the racial exclusion . . . There is nothing surprising to black Clevelanders about racism in Parma.

These statements by the Mayor and the City Council President contributed to the creation of Parma's image of racial exclusion. Parma's racially exclusionary image is a perpetuating cause of housing segregation. One of the factors that influences most people in considering where to live is whether they will be welcome (Tr. 701, 769-771). People desire to avoid hostile situations, and the perception that they are not wanted in a certain area is a real deterrent to their moving into the area (*id.*). Because Parma is viewed as a place where blacks are not welcome, blacks are prevented from moving there and the City's virtually all-white composition is maintained.

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24. This attitude continues to be expressed by Mayor Petruska. At trial he insisted that Parma was integrated when it had three black families, because "the numbers don't count." (Tr. 1396-1397). In his deposition, Mayor Petruska felt unable to respond to the question of whether he favored racial integration in Parma (Petruska dep. 277-278). By the time of trial, he was able to modify but not clarify his response: "I have no problem with it." (Tr. 1394).

It is against this backdrop that the government's pattern and practice suit challenges five specific actions or series of actions taken by Parma:[25]

(A) Parma's refusal to enact a fair housing resolution welcoming "all persons of goodwill";

(B) Parma's general opposition to all forms of public and low-income housing;

(C) Parma's denial of building permits for a privately-sponsored low-income housing development—Parmatown Woods;

(D) Parma's enactment and application of four land use ordinances which impose height, parking and voter approval limitations on housing developments; and

(E) Parma's refusal to submit an adequate housing assistance plan in connection with its application for Community Development Block Grant Funds.

It is these actions, individually and collectively, which the government alleges violated the Fair Housing Act. The government contends that these actions denied rights to groups of people and amounted to a pattern and practice of resistance to the full enjoyment of rights granted by the Act.

A. REFUSAL TO ENACT THE FAIR HOUSING RESOLUTION

In the late 1960's, a number of communities in the Cleveland area considered proposals to demonstrate local

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25. Another action challenged by the government took place shortly before the Fair Housing Act was passed and therefore cannot constitute an independent violation of the Fair Housing Act. *Cf. Hazelwood School District v. United States*, 433 U.S. 299 (1979). It is discussed in Appendix II.

support for the recently passed state and federal fair housing laws (Tr. 84, 1304). At least one local fair housing organization actively promoted the area-wide passage of fair housing resolutions by proposing specific language for adoption by the various government bodies (Tr. 1303; Sands dep. 45-46). A number of communities, including Parma's neighbor, Parma Heights, adopted such resolutions (Tr. 1416-1417). Some, including Parma, did not (Tr. 1304; Sands dep. 30-31; Gov. Ex. 31; Petruska dep. 36).

A proposed fair housing resolution was put before the Parma City Council in mid-1968 by John F. Sands, a Councilman-at-large and the Majority Leader. Part of its language stated simply that ". . . all persons of good will have been and are welcome in the city of Parma by this Council . . ." (Gov. Ex. 122; Sands dep. 33)[26]

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26. The fair housing proposal in its entirety is as follows (Gov. Ex. 122):

WHEREAS, some of the residents of the city of Parma have requested the Parma City Council to pass a resolution concerning a position on Fair Housing; and

WHEREAS, there is a great general interest in the position of every city on Fair Housing.

WHEREAS, all persons of goodwill have been and are welcome as residents of the city of Parma.

WHEREAS, all property owners of the city of Parma shall and do have the right to control the sale of their property as they wish; and

WHEREAS, no municipal authority should enact any legislation or pass any resolution that would diminish the rights that a person acquires when he becomes a property owner.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF PARMA, COUNTY OF CUYAHOGA AND STATE OF OHIO:

That all persons of goodwill have been and are welcome in the city of Parma by this Council; and

That realizing this or any other resolution should not be used to enforce morality; this Council defends the individual property owners' right to sell, lease, rent, control or dispose of their private homes and their right of association and the private enjoyment and use of their own homes.

Mr. Sands actually was ashamed of proposing such a weak resolution (Sands dep. 37), but, although he wanted to use much stronger language, he was convinced that a strong proposal would have absolutely no chance of passage (*id.* at 37-39, 44). Accordingly, Sands offered a resolution which would have no legally binding effect. Instead of identifying which people were to be "welcome" in Parma (such as people of all races), the resolution simply welcomed all people of "goodwill." The proposal also contained language defending the right of Parma property owners to dispose of their property as they wished in order that the resolution would not appear to "enforce morality" (Gov. Ex. 122).

Despite the manifestly weak language of the proposed open housing resolution, it aroused tremendous controversy and opposition. Mr. Sands was deluged with about a hundred letters and telephone calls during the three-week period after he introduced it (Sands dep. 18-19). Most of those who contacted Mr. Sands were opposed to the resolution, and many said he should not even talk about open housing because there was no need for it (*id.* at 22-23). A significant number openly expressed opposition to integration (*id.* at 23). Mr. Sands described the intensity of opposition to his proposal as "unbelievable" (*id.* at 18-19).[27]

Mayor Petruska opposed the resolution publicly. In a meeting with clergy, Council members and Parma citizens concerning the proposal,[28] he noted that the problems

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27. Mr. Sands recalled only one other proposed legislation that evoked an equivalent reaction—a proposal relating to gun control (Sands dep. 24).

28. Mayor Petruska does not recall this meeting (Petruska dep. 33). The testimony of Mary Dunning on this point is discounted. She testified about a meeting in late 1967 or 1968 which discussed a fair housing resolution proposed by Operation Equality (Tr. 1293-1294). This is not the same as the resolution proposed by Mr. Sands in mid-1968 (*see* Sands dep. 10).

of the City of Cleveland should remain in Cleveland and Cleveland should deal with them; Parma would deal with Parma's problems (Tr. 89). During this litigation, however, Mayor Petruska changed his reason for opposing the resolution. At trial he testified that Parma was already bound by state fair housing laws which he was sworn to uphold, and therefore that the resolution was surplusage (Tr. 1322-1323).

On September 3, 1968, the Parma City Council rejected the proposed fair housing resolution by a vote of 7 to 5 (Gov. Ex. 31; Sands dep. 14). No evidence indicates that anyone voted against the resolution because it was too weak.[29] Those who voted against the resolution claimed that it was too specific in proscribing discrimination on account of race and religion, that it implied that Parma had discriminated in the past (Tr. 1306; Dunning dep. 198-199), and that it was simply unnecessary (Sands dep. 41; Tr. 1295).

However, the Court finds that the resolution was defeated, at least in part, because of opposition to racial integration. The resolution nowhere mentioned race or discrimination; nor could it have been understood as more than a good-will gesture. As Mr. Sands described the resolution, it was simply an "open declaration of an attitude" (Sands dep. 142).

The Court rejects Mayor Petruska's testimony that he opposed the resolution solely because state law, which he is sworn to uphold, already provided for fair housing (Tr. 1322-1323; Petruska dep. 33). Mayor Petruska, a law-

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29. At trial. Parma asserted that the resolution might have been defeated because of language reaffirming the individual property owner's unfettered right to sell and rent property. The Court notes the self-serving nature of this asserted justification and finds no support for it in the record.

yer, surely understood the difference between a resolution and a law. The fair housing resolution was not legally binding; rather, it simply espoused an attitude. Mayor Petruska's testimony also is refuted by his contemporaneous public statements, and by his later public comments on this subject. In late 1970 or early 1971, for example, Mayor Petruska addressed a meeting of the Parma Jaycees Wives (Tr. 101-103). At the meeting, a former president of that organization, who was a Parma resident for seven years, asked Mr. Petruska: "What about open housing in Parma?" (Tr. 103-104). The Mayor responded: "You don't have to worry about that. Our neighborhoods will stay the same" (Tr. 104). When the questioner then informed the Mayor that she supported open housing, the Mayor indicated that there already was open housing in Parma because three or four black families lived there (Tr. 104, 116).

The Court rejects Parma's contention that its refusal to enact the fair housing resolution had no segregative effect. Certainly passage of the resolution alone would not have insured that increasing numbers of blacks would choose Parma as the place to reside.[30] Unlike an ordinance, a resolution is intended to be symbolic; it is evidence of an attitude. As such, symbols do have meanings. By refusing to welcome "all persons of goodwill" as residents of Parma, the City sent out the message that black people of goodwill were not welcome. This contributed to Parma's image as a city that was reserved exclusively for whites (Stokes dep. 41-42).

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30. In 1968, the City of Parma Heights adopted a differently-worded Fair Housing Resolution which apparently has not appreciably altered the racial composition of that city (Tr. 1417).

B. PARMA'S REJECTION OF PUBLIC AND LOW INCOME HOUSING

1. *Conventional Public Housing*

a. *Public Housing Segregation in Cuyahoga County*

With one minor exception, all of the conventional public housing in Cuyahoga County is administered by the Cuyahoga Metropolitan Housing Authority (CMHA) (Gov. Ex. 22, p. 1). A vastly disproportionate number of public housing tenants are black. Although the Cleveland metropolitan area is only 16.1% black, almost two-thirds of the tenants in public housing are black (Gov. Ex. 11).[31] The waiting lists for public housing are even more heavily black; in 1979, for example, 78% of the families on the waiting lists (1437 of 1843) were black (Gov. Ex. 16).

Virtually all conventional public housing in Cuyahoga County has been built by CMHA inside of Cleveland (Tr. 627; *see* Gov. Ex. 107), and most of it is located in neighborhoods that are heavily black. In 1971, 20 of the 27 public housing projects were located on the east side of Cleveland in areas of heavily black concentration (Gov. Ex. 107). In 1978, this was true for 20 of 35 projects, and 5 of the 15 projects on the west side were in the few areas of heavy minority concentration (*id.*).

There is a huge shortage of public housing in Cuyahoga County. The total tenant population in public housing in 1973 was about 25,000 people (Gov. Ex. 20, p. 10). Another approximately 48,000 families are eligible for public housing in Cuyahoga County (Gov. Ex. 22). This

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31. The 1978 occupancy reports (Gov. Ex. 11) show that black families resided in 5,269 of the 7,903 units leased by CMHA (or 66%). In 1971, CMHA leased 8,768 units, of which 5,646 (or 64%) were occupied by blacks (Gov. Ex. 13).

severe shortage of public housing is directly attributable in part to the exclusion of public housing from the suburbs and its concentration in minority neighborhoods within Cleveland. There are two reasons why this situation developed.

First, within Cleveland itself, CMHA followed policies which had the effect of segregating public housing on the east side until this Court's 1972 decision in *Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part, rev'd in part on other grounds*, 473 F.2d 910 (6th Cir. 1973). Before the Stokes administration took office in the late 1960's most of the public housing in Cleveland was in black neighborhoods on the east side. When Stokes tried to have projects constructed on the west side without a guarantee that blacks would be excluded (Stokes dep. 95), the Cleveland City Council opposed a cooperation agreement between the City and CMHA (*id.* at 82). The Council finally signed a cooperation agreement when HUD threatened to cut off federal funds (*id.* at 89). But once the guarantee of all-white public housing in white neighborhoods was removed, there was vehement opposition to public housing by west side residents (*id.* at 36). In 1971, a new city administration yielded to this public resistance and revoked building permits for new projects on the west side. *Banks v. Perk, supra* at 1178-1179. Finding that both the city and CMHA had violated the Constitution and the Fair Housing Act, this Court ordered the city to grant necessary building permits, and ordered CMHA to cease building projects in minority neighborhoods until public housing within Cleveland was desegregated. *Id.* at 1180, 1185-1186.

Following the order in *Banks v. Perk*, public housing segregation within Cleveland, although still pronounced, has lessened substantially. In the projects located in white

neighborhoods on the west side, about 40% of the non-elderly occupants are black.[32]

A second reason for the substantial shortage of public housing in the Cleveland metropolitan area is that CMHA was prevented from building public housing in the suburbs. To construct conventional public housing in any community, CMHA must first enter in a cooperation agreement with that community under which the Housing Authority will make payments lieu of taxes and the community will give the Authority all services provided to all other residents (Tr. 627). The only suburbs which have signed cooperation agreements with CMHA are East Cleveland, Cleveland Heights and the Village of Oakland (Tr. 627). All others, including Parma, have refused.

b. *Parma's Need for and Refusal to Allow Public Housing*

Like other suburbs of Cleveland, Parma has a genuine need for public housing. Well over 1,000 families living in Parma are eligible to live in public housing (Gov. Ex. 45; Petruska dep. Ex. 24, Table 15). And according to one study, over 1300 families who reside in the City of Cleveland and are eligible for public housing have expressed an interest in moving to Parma (Gov. Ex. 22).

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32. Gov. Ex. 107 shows the location of all public housing projects. Five projects (Riverside Park, Crestview, Riverview, Loraine Square and West Boulevard Place) are in white neighborhoods. There are 1578 families living in these projects, of whom 486 are non-elderly (Gov. Ex. 11). 197 of the 486 non-elderly families are black (40.5%), while 95 of the 1092 units for the elderly (8.7%) are occupied by blacks (*id.*).

33. One study has found that there are about 15,000 families living in the suburbs who are eligible for public housing (Gov. Ex. 22). Another approximately 8,900 families now residing in Cleveland, who are eligible for but do not live in public housing, desire to move to the suburbs (*id.*). Thus, the net suburban need for public housing amounts to about 24,000 families.

Officials of the City of Parma have long been aware of the need for public housing in their city. But instead of acknowledging the need for such housing, they have chosen to deny that the need exists and have ignored all invitations to participate in conventional public housing programs and other low-income housing programs.

In early 1969, the director of CMHA contacted public officials in Parma and advised them of various public housing opportunities that were available (Gov. Ex. 39). Parma officials were also sent a copy of CMHA's annual report for 1969 which advised them of the City's need for low-income housing and invited Parma's participation in CMHA's programs (Gov. Ex. 38). On July 25, 1969, the Chairman of CMHA sent a letter to all mayors in the Cleveland area inviting them to arrange discussions of CMHA's programs (Gov. Ex. 40). Mayor Petruska was among those who received the letter, but he did not respond to it (Tr. 627-629).

On March 18, 1971, Robert Fitzgerald, then director of CMHA, attended a meeting of the Cuyahoga County Mayors and City Managers' Executive Board at which Mayor Petruska was present. Fitzgerald addressed the group on the various programs offered by CMHA and explained that they could enter into a cooperation agreement with CMHA and make housing available to residents of their own area. Mayor Petruska expressed his desire that the suburbs have representation and input into CMHA decisions. After the meeting, however, no one from Parma contacted either CMHA or Fitzgerald (Tr. 640).

Although Mayor Petruska did not communicate with anyone at CMHA regarding the programs which had been discussed, he did not withhold his views from Parma officials or the public. Petruska made it clear that he had no interest in any form of public housing, and expressly

instructed the City Council not to enter into a cooperation agreement with CMHA (Tr. 1392). In an August 14, 1972 newspaper interview, Mayor Petruska responded to a report showing a need for public housing in Parma by stating that "Parma does not need and does not want" any low-income housing and vowing that he would fight any attempts by CMHA to build housing in Parma (Petruska dep. Ex. 17).

2. *Other Low Income Housing Programs*

In addition to conventional public housing, many other kinds of low-income housing have been available to Parma, but the City has consistently refused to participate in such housing. In 1972, for example, CMHA was following a policy of diffusing public housing through the home ownership, or "turnkey" program (Tr. 667). On March 10, 1972, CMHA's director wrote to all mayors of communities of Cuyahoga County, including Mayor Petruska, informing them of the turnkey program and asking for the opportunity to discuss it with them (Gov. Ex. 43). Mayor Petruska did not respond to CMHA's letter (Tr. 664). On June 19, 1972, Mayor Petruska was sent another letter by CMHA's director in which the turnkey program was explained in detail (Gov. Ex. 44), and again there was no response (Tr. 642). The clear inference to be drawn from such conduct is that Mayor Petruska and the City of Parma had no interest in getting involved in the turnkey program.

Parma's conduct with regard to "Section 8" housing also illustrates a consistent policy of resistance to all forms of low-income housing. Under Section 8,[34] the principal

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34. Section 8 of the United States Housing Act of 1937, as amended by Section 201(a) of the Housing and Community Development Act of 1974, 42 U.S.C. §1437f, and by the Housing Authorization Act of 1976, §2, 90 Stat. 1068.

family subsidized program since 1972 (Tr. 604-605), a qualfied family or individual pays between 15 and 25% of its income for rent and the government subsidizes the difference between that amount and the fair market rent (Tr. 554). This program includes the use of existing housing, rehabilitation and new construction (*id.*).

There is no need for a metropolitan housing authority to be directly involved with the Section 8 program (Tr. 605). It is also not necessary that a municipality enter into a cooperation agreement with a housing authority in order to have regular Section 8 housing placed within a community (Tr. 605). A private developer can simply respond to a HUD notification and rehabilitate units without CMHA or municipal involvement (Tr 571). However, although specific municipal approval is not required in order to build Section 8 projects (other than a building permit), a municipality does play an important role. It can help the program by assisting project sponsors in finding acceptable sites, bringing needed utilities to the site, and using community development funds for access roads or road improvement (Tr. 569). A community also can facilitate Section 8 programs by setting up places where residents can apply for certification, and by informing them about the program and how much they can save if they are eligible. Additionally, a municipality can inform landlords about Section 8 housing and its advantages (Tr. 654-655). While these actions are all voluntary, they may be crucial to the successful development of Section 8 low-income housing.

Although the Section 8 program does not require the involvement of a metropolitan housing authority, CMHA can get involved in the management of Section 8 projects as it has in Berea, Cleveland Heights and University Circle. CMHA can also issue certificates to qualified individuals

to live in private apartments which have met HUD standards (Tr. 647-648).

The Section 8 program has worked well in the Cleveland metropolitan area. It has provided housing for approximately 3400 families, half of whom live outside of Cleveland (Tr. 651). The program also has offered substantial opportunities for low-income blacks. In 1979, 2015 of the 3389 families with Section 8 certificates were black (Gov. Ex. 17). Of the 765 families on the 1979 waiting list, 684 were black (Gov. Ex. 15), and of the 313 elderly households on the waiting list, 109 were black (*id.*). The Section 8 program also has resulted in the movement of some blacks to the western suburbs. A newly constructed project in Berea, for example, has 108 units of which 37 are occupied by blacks. Six of these black families were from Berea, while 32 moved to the project from the east side of Cleveland (Tr. 655-656).

Parma has refused to participate in the Section 8 program. Mayor Petruska testified that he may have received literature regarding the program from CMHA and that he did not recall himself or anyone else from Parma attending any meetings on the matter (Petruska dep. 280-281). The record clearly establishes that Mayor Petruska received information about Section 8 housing. On August 13, 1975, CMHA sent a letter to Petruska notifying him of a meeting about the Section 8 program to be held on August 28, 1975 (Gov. Ex. 116). An identical letter was sent to John Zielinski, the President of Parma's City Council (Gov. Ex. 117). At that meeting, it was explained how municipalities could help in marketing the Section 8 program and how their residents could apply to and be certified for the program (Tr. 653). Although representatives from 27 other communities attended the meeting (Tr. 653), no one from Parma was there (Tr. 651). In

this city of over 100,000, there are only 48 people who have been able, without Parma's help, to find existing housing under the Section 8 program. Of that number, 12.5 per cent are black (Gov. Ex. 17).

3. *The Effect and Intent of Parma's Actions*

Parma's opposition to any form of public or low-income housing has had an acute and foreseeable segregative effect on this virtually all-white city. Statistics reveal that most public housing and Section 8 tenants in the Cleveland metropolitan area are black; the same is true of the waiting lists for those programs. Moreover, in instances when public housing or Section 8 projects have been built in white neighborhoods on the west side or in the western suburbs, blacks frequently have taken advantage of those opportunities and have moved into those projects. For the thousands of other black families eligible for such housing and living in Cleveland who want to move to the suburbs[35] (*see* Gov. Ex. 22), the inability to secure affordable housing represents a serious and generally insurmountable barrier.

In the face of this segregative effect, and against the needs of many of Parma's own residents for public or low-income housing, Parma offers only one explanation in this record for its actions. This is Mayor Petruska's explanation that public housing means CMHA involvement, and because he considers CMHA to be incompetent he will have nothing to do with public housing. The Court rejects this explanation as not supported by the

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35. No accurate figure exists regarding the number of low-income blacks who desire to move to Parma. One study places the total number of persons wishing to move to Parma at 1300 (Gov. Ex. 22). There is no evidence to indicate that even with Parma's racially exclusionary image, substantial numbers of blacks are not included in that number.

evidence. Rather, the Court finds that the desire to keep Parma all-white has become a primary factor behind the City's decision to prevent any public or low-income housing from being built.

The evidence clearly demonstrates that Parma has opposed all public and low-income housing, irrespective of CMHA's involvement. In 1971, when Mayor Petruska was running for re-election, he explained in an open letter to the community that he supported a controversial housing project because it was composed of "luxury" apartments.[36] In the same letter, and in large bold type, he stated, "Mayor Petruska IS OPPOSED TO PUBLIC HOUSING IN PARMA". In this letter to the electorate, Mayor Petruska concluded, "I want to emphasize that I am COMPLETELY OPPOSED TO ANY TYPE OF PUBLIC OR LOW INCOME HOUSING IN THE CITY OF PARMA." (Gov. Ex. 75). Again in 1975, in another re-election campaign, Mayor Petruska once more announced his opposition to public or low-income housing and stated that none was needed in Parma (Tr. 1375, 1376; Gov. Ex. 105).

At trial and in his deposition, Mayor Petruska testified that his strong public opposition to all public and low-income housing resulted only from the fact that no proposal for such housing was before the City at those times (Tr. 1374-1376; Petruska dep. 200). At best, with respect to the 1971 campaign statements, this assertion is incorrect since the Parmatown Woods proposal was under active consideration. *See* pp. A107-A110, *infra*. When asked under oath about his position on public or low-income housing, Mayor Petruska refused to take a position, saying, "I can't

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36. The Mayor stated that the apartment units "are not federally financed housing, are not low income and are not senior citizen housing. Rather, they are high quality, high priced units with starting rates of $175 for a one bedroom apartment on up to $270 per unit." (Gov. Ex. 75).

make any general statements in my business." (Petruska dep. 276). Mayor Petruska's position for this litigation, and the position he represented to the people of his community in two successive mayoral campaigns are contradictory. His public position uniformly and all-inclusively opposed low-income or public housing. This Court does not believe that Mayor Petruska twice deliberately misrepresented his position on public and low-income housing to his constituency.

Mayor Petruska testified that the statements contained in his campaign literature relative to public housing were made in the belief that the CMHA would be involved in the management of the property (Tr. 1336).[37] Certainly his public statements on this matter contain no such qualification or reservation. Rather, they reveal a complete opposition to all forms of public housing. In any event, it is clear that some forms of public and low-income housing can be met without CMHA involvement.[38] Thus Mayor Petruska's allegation that CMHA management shortcomings led him to oppose low-income housing appears to be a present rationalization. The record is devoid of any evidence that Mayor Petruska or any other Parma official had criticized CMHA's operations in the past, even though they had many obvious opportunities to do so. Indeed, members of the Parma City Council could not recall even a single conversation during Council meetings about CMHA. (Wojas dep. 124-125; Kopchak dep. 154-155).

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37. At trial, Mayor Petruska testified that he was not opposed to public housing in Parma if CMHA were not involved and added "as a matter of fact, we have such a project" (Tr. 1337). There is no evidence in this record that such a project exists; in fact, the record refutes this claim.

38. Parma, for example, could participate in the Section 8 program without CMHA. And even in the area of conventional public housing, Parma officials were well aware that such housing could be built without CMHA involvement (Tr. 1377-1378; Petruska dep. 212).

At trial, Mayor Petruska testified that CMHA operations had been "going downhill year by year" (Tr. 1358), an observation he allegedly formed by driving by different projects in Cleveland, and reading newspaper articles and other reports about CMHA (Tr. 1332-1333).[39] But Mayor Petruska also has stated that he goes to Cleveland only two or three times a year (Gov. Ex. 30, p. 14), that he does not know that the east side of Cleveland is heavily black (Petruska dep. 47-48), and that he does not necessarily trust what he reads in the newspaper (Petruska dep. 62, 111) or in reports.[40] In any event, the Court cannot believe that Mr. Petruska would not have expressed publicly these deep and long-standing criticisms of CMHA if he had really held them.

The Court finally notes that Mayor Petruska equates public and low-income housing with housing for blacks. In 1971, when asked how he or any other city official as Christians could exclude people of any race or color from residing in Parma, he immediately responded (Petruska dep. Ex. 13):

> Neither I or to my knowledge any other city official favor discrimination. I personally do object to any plan for the *creation of low-income housing* since I do not feel that this is a problem for tax payers to absorb . . . I do not believe that destroying our community by creating Cleveland's problems within our city will achieve any overall good for anyone of any color or race. (emphasis added)

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39. Parma relies on a 1973 study to prove that CMHA's operations were inadequate (Def. Ex. DS). There is no evidence in the record to indicate that Mayor Petruska had ever read or been aware of the study prior to trial in 1979.

40. *See, e.g.*, Mayor Petruska's views of HUD reports showing Parma's need for low-income housing (Tr. 1382, 1384; Petruska dep. 221-225).

Apparently, in Mayor Petruska's eyes, Cleveland's problems and low-income housing both translated into blacks, since his response to a question of race was answered in such terms. On another occasion when he was asked about low-income families, Mayor Petruska began to talk in terms of "blacks" (Petruska dep. 106). The evidence shows that Parma's mayor equates low-income housing with blacks.

This equating of low-income housing with blacks is not limited to Mayor Petruska. When a specific low-income housing proposal was brought before the City by a private developer there was passionate opposition from Parma residents and city officials on the overtly stated ground that blacks might move into this project. *See* pp. A98-A107, *infra*.

This Court does not believe that low-income housing should be equated to blacks. Blacks have not been the only victims of Parma's opposition to low-income housing. Unfortunately, many of Parma's own residents have suffered by being unable to obtain needed housing because of the City's fear that blacks would be among the beneficiaries.

C. THE DENIAL OF A BUILDING PERMIT FOR PARMATOWN WOODS

In 1971, there was a genuine need for low-income and senior citizen housing in the City of Parma. In response to this need, a local developer, Forest City Enterprises, proposed to construct a federally subsidized multi-family housing project. This project was to be named Parmatown Woods. Up to this time, there never had been any federally subsidized low-income housing in Parma. (Tr. 573, 1252; Reinke dep. 201). Applications for the building permits needed for construction of Parmatown Woods were

submitted by Forest City Enterprises to Parma officials. After review, the building permits were denied, allegedly because of non-compliance with Parma's land-use ordinances. The Court finds that an important reason for the denial of the building permits was the fear that blacks would live in Parmatown Woods. This fear resulted in deviations from standard procedure and substantive norms and rendered impracticable, if not impossible, compliance with the land-use ordinances.

1. *The Background of Parmatown Woods*

The crucial question concerning the rejection of the building permits for Parmatown Woods is whether Parma's stated reasons for rejecting them are the true reasons or whether they mask a racially discriminatory motive. In addressing this question, the rejection of Parmatown Woods cannot be considered in a vacuum. To discover whether procedural and substantive norms were followed, the treatment accorded Parmatown Woods must be compared with the treatment Parma gave to other multi-family high-rise housing projects which were proposed and built around the same time.

No building construction can commence in Parma before issuance of a written permit by the Building Commissioner in accordance with the Zoning Code or other city regulations. Parma, Oh., Planning and Zoning Code §1125.02. The permit is not to be issued until plans for the development are complete and accepted (Vittardi dep. 43). According to Parma's Building Commissioner, Jerry Vittardi, the plans which are submitted for "just about every apartment development" are incomplete, and therefore it is necessary for the developer to submit revisions (*id.*). Under local regulations, a permit is not to be issued until these revisions have been accepted. However, the treat-

ment accorded four apartment complexes—Midtown Apartments, Regency Towers, Parmatown Gardens, Parmatown Towers—indicates that the formal regulations and procedures regarding the issuance of building permits in the City of Parma have not always been adhered to.

On April 4, 1968, an application for a building permit for Midtown Apartments, a three building four-story apartment complex, was filed with Parma. After this filing, the City's Engineering Department determined that the plans for the complex were deficient because revisions needed to be made in the plans for Building "C" of this Apartment complex. In spite of the fact that the original plans were deficient, a building permit was issued on September 2, 1968 which permitted construction to begin on Buildings "A" and "B" of the complex. Approval of Building "C", and therefore approval of the total plan as originally submitted, was withheld subject to revision of the plan and subsequent approval by the City. A resubmission of the plans in 1969 resulted in an additional request by Parma officials for further changes. A final submission of the plans was made to the City in September 1969, one year after the original building permit had been issued which allowed construction to begin on the project (Gov. Ex. 72, 73).

Another example of the failure of Parma to follow formal rules and regulations is evident in the treatment accorded Regency Towers. In 1971, an application for a building permit for Regency Towers, another multi-family high-rise apartment complex, was submitted to Parma's Building Department at a time when there was the threat of a moratorium on water connections by the City of Cleveland (Reinke dep. 32, 123). In order to cooperate with the builders of the project complex and allow them to obtain a water connection prior to the moratorium taking

effect, the Parma Building Commissioner issued a building permit before the full set of plans were reviewed for compliance with the City's ordinances (Reinke dep. 123-124). Thus, the developer was issued a permit which allowed construction to begin before Parma approved the plans for the building,[41] although a building permit for an apartment building should not have been issued until the plans have been approved by the City Engineer (Vittardi dep. 31).

The Parmatown Gardens development is a third example of Parma's failure to follow formal procedures for the issuance of a building permit. Plans for the construction of Parmatown Gardens were submitted by Forest City Enterprises in 1972, and after review by city officials a building permit was issued (Reinke dep. 126). After this building permit was issued, Forest City was allowed to revise its plans for Parmatown Gardens by changing the allocation of bedroom units in the complex (Reinke dep. 126-127). The plans for Parmatown Gardens therefore were reviewed twice—once before the building permit was issued and once after it was issued (*id.* at 127). Even though revisions in plans are supposed to be made before a building permit is issued (Vittardi dep. 43), a revision of the Parmatown Gardens plans was allowed because Parma felt it would "cooperate" with Forest City, which said it had made a mistake in drawing up its plans for the complex (Reinke dep. 127).

The fourth example demonstrating the flexibility of the process for issuing building permits is the Parmatown Towers development, a 10-story multi-family housing com-

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41. There is no evidence in the record indicating whether construction actually began prior to approval of the plans or whether there was tacit understanding not to commence construction until final plans were approved (Reinke dep. 170-171). In either case, the normal procedures for building permit issuance were not followed.

plex which was built on land immediately adjacent to the land on which the proposed Parmatown Woods complex was to be built (Tr. 585-586; Reinke dep. 32).[42] The Parmatown Towers proposal was first submitted to the City of Parma by Forest City Enterprises in 1968. The proposal was not approved because the developer was not able to obtain the necessary rezoning (Dunning dep. 10-13). Although the City Council voted 8 to 4 to grant the rezoning request (Sands dep. 47), Mayor Petruska vetoed the proposal (Tr. 1174, 1320-1321).[43] This was not the first time that opposition had ben voiced concerning high-rise apartments. In 1963, when the high-rise classification was made part of the Parma Zoning Code, referendum petitions opposing the classification were circulated among the electorate, but the issue was never placed on the ballot due to the failure to obtain enough signatures (Tr. 1177-1178).

In 1969, Forest City again attempted to obtain rezoning for its proposed site and this time was successful (Tr. 1176; Dunning dep. 42-43). Objections to rezoning, such as possible traffic and sewer problems (Sands dep. 55),

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42. The complex was built under a HUD program entitled Section 221(d)(4), which is not a government subsidy program, but under which the building mortgage is insured by the Federal Housing Administration (Tr. 585-586, 618-619).

43. Forest City asked the Parma City Council to rezone the parcel of land from residential to high-rise classification E-5, which would allow construction up to 100 feet high (Dunning dep. 10-13; Sands dep. 51). The rezoning proposal attracted both support and opposition. The Parma Chamber of Commerce and the Board of Education voiced their support for the proposal (Gov. Ex. 49, 50, 51) citing, among other things, the increase in tax dollars which the proposed new apartment development would bring into the City. Paul Kisil, a Parma City Councilman at the time, felt that the rezoning was good planning for Parma (Kisil dep. 36). Opponents of the proposed rezoning of the Parmatown Towers site claimed that the new apartment complex would cause sewer and traffic problems (Sands dep. 47-48; Dunning dep. 27-28; Kopchak dep. 15; Tr. 1282-1283), was not safe from a fire standpoint (Kopchak dep. 15; Dunning dep. 27-28), and would be too high (Kisil dep. 25).

were overcome when Forest City touted the new apartments as "luxury" apartments (Dunning dep. 42-43, 49, 156-157; Sands dep. 56-60). Some members of the City Council who had opposed rezoning in 1968 now voted in favor of it because of an "impressive blue booklet" distributed by Forest City which emphasized the luxury nature of the apartments (Dunning dep. 156-167). The Council now approved rezoning for the site of this six-story luxury apartment complex by a vote of 11 to 1 (Sands dep. 54). Mayor Petruska, who had vetoed rezoning the year before, explained why he changed his position and now favored construction of the Parmatown Towers development (Gov. Ex. 75, p. 2). The apartments, he wrote:

> ARE NOT FEDERALLY FINANCED HOUSING, ARE NOT LOW INCOME AND ARE NOT SENIOR CITIZEN HOUSING. RATHER THEY ARE HIGH QUALITY, HIGH PRICED UNITS WITH STARTING RATE OF $175 FOR A ONE BEDROOM APARTMENT ON UP TO $270 PER UNIT. (emphasis in original)

It was the "luxury" nature of the apartment complex that prompted Mayor Petruska not to veto the rezoning change.

The next official action concerning Parmatown Towers occurred on March 9, 1971. The portion of Ames Road on which Parmatown Towers was to front had not been dedicated to the City (Tr. 1196, 1233). On March 9, Forest City appeared before the Parma Planning Commission to dedicate Ames Road to the City and asked the Planning Commission to accept the dedication for record purposes only (Tr. 1194; Gov. Ex. 77, 82). Forest City explained that the Cleveland Water Department had threatened a ban on future water hook-ups (Tr. 1194) and that before the Water Department would review the plans for Parmatown Towers, the street dedication had to be accepted for record

purposes (Tr. 1195). Later that day, the Parma Planning Commission accepted the dedication of that portion of Ames Road on which Parmatown Towers is located for record purposes only, "with no further obligation on the City until such time as Council actually accepts proper dedication" (Tr. 1193, 1235-1236; Reinke dep. 174; Gov. Ex. 77).

The significance of this very limited dedication acceptance by the Planning Commission for "record purposes only" is understood when one looks at Parma's Planning and Zoning Code (Gov. Ex. 123). Parma ordinances §1101.06(d) and §1101.08 provide that a building permit can be issued by the City of Parma only if the street on which the proposed development is located is dedicated to the City and officially accepted by the City Council (Tr. 1234-1235). These ordinances also make it clear that only official acceptance of a dedicated street by the Parma City Council obligates the city to provide services such as rubbish and garbage pickup and maintenance of street improvements. The Planning Commission of Parma realized these facts on March 9, 1971, when it accepted the Parmatown Towers dedication for record purposes only. This is evidenced by the Planning Commission's disclaimer of provision of city services and its recognition of the future necessity for "proper" Councilmanic dedication (Gov. Ex. 77). In light of the foregoing, this Court finds that the March 9, 1971 acceptance of the Ames Road dedication by the Parma Planning Commission was not the official Councilmanic acceptance of a street dedication envisioned by the Planning and Zoning Code, and that such acceptance did not authorize the issuance of a building permit for Parmatown Towers.

Actions taken by the City of Parma with regard to Parmatown Towers subsequent to the March 9, 1971 meet-

ing of the Planning Commission indicate that Parma did not consider such things as street dedication ordinances and normal city administrative procedure to be barriers to construction. Rather, the manner in which the Parmatown Towers matter was handled indicated that Parma would bend the rules when it wished to cooperate with a developer of a non-subsidized multi-family housing project. In spite of the fact that the Parmatown Towers plans submitted by Forest City to the City of Parma were not finally approved until a short time after the Planning Commission meeting of May 11, 1971[44] (Gov. Ex. 85; Tr. 1225, 1259, 1172-1173; Petruska dep. 15), the building permit for Parmatown Towers was issued on March 23 and 24, 1971 (Gov. Ex. 84, 76; Tr. 1196, 1237) with no conditions attached, as far as the City of Parma was concerned (Tr. 1197; Gov. Ex. 84).

The issuance of a building permit for Parmatown Towers in March 1971 some two months before approval of plans by the Planning Commission was contrary to stated administrative procedures. As noted above, a building permit could not be issued under the local ordinances until the developer's plans have been approved by the City Engineer. Issuance of the Parmatown Towers building permit prior to plan approval was done by Parma "in the spirit of cooperation" with Forest City. The developer was thereby allowed to avoid a threatened ban on water hook-ups which never occurred (Reinke dep. 123, 127-128).

The "spirit of cooperation" which had led Parma to ignore standard procedure in the issuance of the building

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44. The minutes of the Planning Commission meeting of May 11, 1971 (Gov. Ex. 85) indicate approval of the Parmatown Towers development subject to an opinion of the City Solicitor, Andrew Boyko, on the legality of a change from a six to ten-story building. Boyko subsequently issued an opinion stating that such a change could be made legally (Tr. 1172-1173).

permit carried the City one step further. The building permit for a Parmatown Towers was issued in violation of Planning and Zoning Code §1101.06 which requires the dedication and Councilmanic acceptance of a street before a building permit for development on that street can be issued (Gov. Ex. 123; Tr. 1234; Wojas dep. 56). The official Councilmanic acceptance of the March 9, 1971 dedication of Ames Road, which was the legal prerequisite for the issuance of the Parmatown Towers building permit, did not occur until August 14, 1972 (Gov. Ex. 78; Tr. 1236-1237), almost a year and a half after the building permit was actually issued.[45]

Based upon the manner in which the building permits were issued for construction of the Midtown Apartments, Regency Towers, Parmatown Gardens and Parmatown Towers multi-family development, the Court finds that Parma's official regulations and standard procedures are applied flexibly. These four examples demonstrate that when Parma officials are in favor of a proposed development, they try to accommodate the developer, and will issue building permits even when not authorized under stated procedures and local ordinances.

2. *Racial Opposition to Parmatown Woods*

In 1971, Forest City Enterprises submitted plans for the construction of a multi-family housing development to

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45. Parma's decision was to ignore the requirement of Planning and Zoning Code §1101.06; it did not result from unawareness. Russell Reinke, the City Engineer of Parma who reviews building plans and has been doing so for eleven and one-half years (Tr. 1186; Reinke dep. 5-6), has knowledge of this Parma ordinance requiring acceptance and dedication of a street before the issuance of a building permit (Tr. 1233). Jerry Vittardi, the Building Commissioner who has been issuing building permits for over six years (Vittardi dep. 28, 30), is also knowledgeable with regard to this ordinance (*id.* at 65). It is the responsibility of both of these men in the normal course of business to check compliance of any proposed development with this ordinance (Reinke dep. 129).

be called Parmatown Woods. The proposed project was to be financed by the use of federal housing subsidies under Section 236 of the National Housing Act, 48 Stat. 1246, as added and amended, 12 U.S.C. §17152z-1. The Section 236 program was a low-income housing program administered by HUD in which the federal government subsidized the project mortgage above a certain interest rate. The federal interest subsidization resulted in reduced rents for the apartments in the project. The Section 236 housing program, which is no longer being funded (Tr. 809, 282), was aimed at low and moderate-income persons. At the time of the proposal of Parmatown Woods, every Section 236 project was encouraged to have 20% of its units occupied by families receiving federal subsidies in the form of rent supplements. A Section 236 project with rent supplements would have a larger proportion of low-income persons than a normal Section 236 project because rent supplement income levels were set at public housing levels (Tr. 566-567).[46]

In February 1971, the Planning Commission of Parma discussed the possibility of securing senior citizen housing (Gov Ex. 47). Following this meeting, Donna Smallwood, the Senior Citizen Director of Parma, undertook a survey of the housing needs of senior citizens. The results showed that most people who responded were interested in senior citizen housing, and that interest was not limited to residents of Parma (Smallwood dep. 16-17). At another

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46. The differences between a Section 236 project such as Parmatown Woods and a project, such as Parmatown Towers, developed under the Section 221(d)(4) program of HUD, were twofold: (1) a Section 221(d)(4) project did not receive any federal subsidy, but only had its mortgage insured by the federal government (Tr. 618-619, 585-586), and (2) a Section 221(d)(4) project was aimed more at moderate income persons than low-income persons. Generally persons with higher incomes would live in a building like Paramatown Towers rather than in a building like Paramatown Woods (Tr. 619).

Planning Commission meeting, held in March 1971, Frank Celeste of National Housing Consultants made a presentation relative to senior citizen housing for Parma (Tr. 1286).

Around the time that Parma officials were considering additional senior citizen housing, Forest City was studying the feasibility of constructing Parmatown Woods. One of the studies pointed out that the proposed complex would be "orientated to the elderly" (Gov Ex. 53).

Parmatown Woods first began taking some type of tangible form in the spring of 1971, when Forest City submitted to the Cleveland Office of HUD an application for a proposed Section 236 apartment complex to be located in Parma, Ohio (Tr. 576; Gov. Ex. 53). The original application of Forest City proposed the construction of a complex containing 408 units (Tr. 574, 576), but the number of units was later cut back to 201 units due to lack of HUD funds. At the time, John Kasulaitis, Chief of Housing Programs at the Cleveland HUD office, was employed by HUD as a multi-family appraiser and he personally appraised the proposed Parmatown Woods site. Mr. Kasulaitis, who had appraised over 100 other multi-family sites, believed that "as multi-family sites go, [the Parmatown Woods site] was one of the best you could ever want to have, and the location was excellent because it was close to all kinds of amenities." (Tr. 559).

Parmatown Woods, also referred to as Parmatown Towers Phase II, was presented formally to the City of Parma on June 22, 1971 at a meeting of the Parma Planning Commission (Gov. Ex. 59). At that meeting, William Warren of Forest City explained that Parmatown Woods would consist of two ten-story buildings containing 408 units, which were to be financed under the HUD Section 236 program. Warren also told the Planning Commission what the rents for the proposed project would be and that

such rents were set by the federal government and could not be raised (*id.*). After Warren told the Planning Commission that Forest City would request a variance from the 2 1/2 parking spaces per apartment unit required by Parma down to one space per unit, the proposal was referred to the Regional Planning Commission for study and recommendations, with special attention to such things as elevators, laundry facilities and security (*id.*; Tr. 1292-1293).

On July 6, 1971, Forest City made a presentation concerning Parmatown Woods to members of the City Council of Parma (Kopchak dep. 52-54). At that meeting, Sam Miller of Forest City stated that the proposed 10-story senior citizen complex would be similar in appearance to Parmatown Towers and would be for Parma senior citizens (*id.*), but that the rents in the proposed complex would be lower than those in Parmatown Towers because Parmatown Woods was to be built under Section 236 (*id.* at 55). Parma officials understood at that time that the rents in Parmatown Woods would be lower because the federal government was paying part of the interest on the building mortgage (Petruska dep. 89; Smallwood dep. 37-38), and that a Section 236 project could have a federal rent supplement program within it, and that this also would lower rents (Dunning dep. 118).

On July 13, 1971, a second meeting of the Parma Planning Commission was held to consider the Parmatown Woods proposal. A representative of the Regional Planning Commission made the report on Parmatown Woods which had been requested at the June 22, 1971 Planning Commission meeting (Gov. Ex. 60). The report indicated, among other things, that the proposed development was in a desirable location and was within the appropriate zoning district (Gov. Ex. 60; Petruska dep. 88). After the Regional Planning representative made his presenta-

tion, Parma officials began to express a concern about the type of residents expected to live in the Parmatown Woods complex. Evelyn Kopchak, a Parma City Councilwoman, questioned whether residents of Parma could be given a preference in renting the units in the proposed development (Gov. Ex. 60; Kuczma dep. 96; Kopchak dep. 68-71). She was advised by William Warren of Forest City that HUD had been contacted, and that an official had assured him that Parma applications could be processed "without violating the restrictions." (Gov. Ex. 60). Donna Smallwood then suggested the possibility of setting up a type of "screening committee" for applicants at Parmatown Woods (*id.*; Kuczma dep. 96; Smallwood dep. 44), to which Mr. Warren responded that Forest City would be agreeable (Gov. Ex. 60). Ms. Kopchak was concerned about whether the proposed development could be sold to CMHA by Forest City (*id.*; Kuczma dep. 96; Kopchak dep. 68-71; Petruska dep. 93). While Parma officials such as Kopchak and Smallwood voiced their concern over the prospective residents of Parmatown Woods, an underlying fear of Parma—the fear that black persons might be moving into Parmatown Woods—was brought out into the open by the two highest ranking elected officials in the City of Parma—the President of the City Council and the Mayor of Parma.

Kenneth Kuczma was the President of the Parma City Council in 1971 (Kuczma dep. 10-12) and was in attendance at the July 13, 1971 meeting (Gov. Ex. 60). Kuczma took the floor and stated, "*I do not want Negroes in the City of Parma*" (emphasis added) (Gov. Ex. 118; Tr. 66-67). Kuczma felt that this was the real issue at stake in the construction of Parmatown Woods and his statement was meant to force everyone to face the issue realistically (Gov. Ex. 118; Tr. 66-67). Kuczma stated that the people of Parma, all of whom he considered as

his constituents (Kuczma dep. 58), were fearful of Negroes coming into the City and that he himself had that fear (Kuczma dep. 100; Kuczma dep. Ex. 3, p. 13). He thought that many residents of Parma had moved there from the east side of Cleveland where they had suffered considerable losses in the sale of their real estate due to an influx of Negroes (Gov. Ex. 118; Tr. 66-67). He also felt that a movement of Negroes into low-cost housing in Parma would cause the community to deteriorate (Kuczma dep. 117-119).

Immediately after Kuczma stated that he did not want Negroes in Parma, and after some people had gone off on "a tangent about black versus white" with regard to Parmatown Woods (Petruska dep. 107-108), Mayor Petruska sought to assuage the fears previously expressed at the meeting. In response to the statements of Kenneth Kuczma and the Parma public who were there, Petruska assured those present that even if Parmatown Woods was constructed, it would not mean that the doors of Parma would be open to the entire "East Side of Cleveland" (Gov. Ex. 119; Tr. 62, 63, Tr. 1359; Petruska dep. 107-108).[47]

At the end of the July 13, 1971 meeting, the Parma Planning Commission "approved" Parmatown Woods, but with two qualifications. First, the Parma Zoning Board of Appeals was to give special attention to possible prob-

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47. Parma seeks to discount this statement by asserting that Mayor Petruska, and indeed all members of the Planning Commission, favored the Parmatown Woods proposal. The evidence does not support this assertion. Although Mayor Petruska voted to "approve" the proposal at the end of this Planning Commission Meeting, the "approval" was conditioned on terms that made construction of the project impossible. Moreover, *after* the July 13, 1971 meeting, Mayor Petruska stated publicly that proper plans had not yet been filed for the proposal and that "[u]ntil proper plans are filed, we really have no accurate facts for anyone to make a decision—all we have is speculation" (Gov. Ex. 75, p. 2).

lems such as the need for additional elevators, full security requirements and a change in laundry facilities. Second, and most critical, the Zoning Board was told that any parking variance should carry with it a restriction "strictly for senior citizens" and any other use of the buildings would cause the variance to lapse (Gov. Ex. 60).

By early October, Parma officials had learned some disquieting news. Councilwoman Kopchak, who had contacted local HUD officials, wrote a letter to Mayor Petruska on October 6, 1971 advising him not only that Parmatown Woods would be low-income housing, but also that it would be open "to anyone who meets the income limitation imposed by the Federal Government and cannot be limited strictly to Senior Citizens." She also noted that "[i]t is doubtful that any stipulations can be imposed whereby the apartments would be limited to Parma residents." (Gov. Ex. 62).

Around this time, Mayor Petruska also was notified of a letter from HUD Secretary George Romney which described Parmatown Woods as a project with two sections—one for elderly and the other for low and moderate income families. In response to these two letters, Mayor Petruska urgently sent telegrams to Secretary Romney and other officials requesting all information dealing with applications for low-income housing within Parma, "so my citizens may have an honest and detailed report of something that greatly concerns them." (Def. Ex. X).

Against this background of intense concern over low-income housing and the possibility of blacks moving into Parma, Parma officials decided to meet with HUD officials to discuss the Section 236 program and Parmatown Woods. Council members Mary Dunning and Kenneth Kuczma tried to set up a meeting with HUD (Tr. 274, 1288-1289; Dunning dep. 64). In response to a call from a Parma

official, Charles Lucas, then the Deputy Director for the Cleveland insuring office of HUD (Tr. 269), invited representatives from Parma to a meeting in his office on October 20, 1971 to discuss the Section 236 program (Tr. 274). Before the meeting, however, several Parma officials called him (*id.*). One call was from Council member Mary Dunning, who wanted information about the Section 236 program and Forest City's involvement in it. Lucas, a black, invited her to attend the October 20th meeting. Dunning said: "Do you know that we don't want blacks in Parma?" Avoiding a response, Lucas said "Don't we?" and Dunning hung up (Tr. 275).

The October 20, 1971 meeting was attended by Lucas, two other HUD officials and eleven Parma officials (including 9 of 11 City Council members) (Gov. Ex. 66). Lucas was asked questions about the Section 236 program, but most of the questions evidenced the same concern of Parma officials over the prospective residents of Parmatown Woods which had been shown previously at the July 13, 1971 Planning Commission meeting (Tr. 278-280). Lucas responded negatively to questions concerning whether Parmatown Woods could be exclusively for Parma residents (Tr. 278, 1290, 539; Kuczma dep. 138-140; Kopchak dep. 119-122; Smallwood dep. 108; Sands dep. 70-71) and whether Lucas could give an assurance that Parmatown Woods would not be sold to the Cuyahoga Metropolitan Housing Authority or become public housing (Tr. 280, 538; Sands dep. 72; Dunning dep. 132-133; Kuczma dep. 138-140). Lucas was asked whether "blacks from Hough and Puerto Ricans from West 28th Street" could become tenants and he replied affirmatively (Tr. 279). Finally, Lucas made it clear to the Parma officials in attendance at the meeting that Parmatown Woods would be open to any low-income persons, and not just to senior citizens (Tr. 1290; Dunning dep. 69; Kopchak dep. 119-122). Ap-

parently, the responses of Mr. Lucas to the questions of the Parma officials were not totally to their liking, and Mr. Lucas characterized the meeting as being "as heated and acrimonious as any" he had ever attended (Tr. 281).

On October 21, 1971, the day following the meeting of Parma officials with Charles Lucas at his office at HUD, John Kasulaitis, a HUD official who had been in attendance at that meeting (Gov. Ex. 66), attended a meeting sponsored by the Catholic Ladies Guild of St. Anthony's Parish of Parma in St. Anthony's Parish Hall (Tr. 539-540). At this meeting, Kasulaitis made a presentation concerning Section 237 and other HUD housing subsidy programs and explained the differences between them and public housing (Tr. 540-541). After his presentation to about 130-140 people, including several Parma City Council members in attendance, Kasulaitis was asked questions from the floor concerning in particular whether the HUD subsidy programs were public housing (Tr. 541). He was asked whether Parmatown Woods could become public housing and whether persons from the "East Side" of Cleveland could become tenants there. After the meeting, Kasulaitis was approached by persons who expressed opposition to the Parmatown Woods project because they expected blacks to become residents (Tr. 540-546).

The testimony of Parma officials further underscores the concern of people in Parma about who would be the residents of Parmatown Woods and more specifically, about whether these residents would be black. Stanley Wojas, City Councilman, received phone calls from his constituents asking if Parmatown Woods was to be for Parma residents only (Wojas dep. 84). He also was asked questions about the race of those persons who were expected to reside in Parmatown Woods (*id.* at 83). John Sands, City Councilman, was asked by other City Council

members whether "public housing tenants" could live in Parmatown Woods (Sands dep. 65, 74) and was also asked by Parma citizens whether he was bringing black people into Parma through Parmatown Woods (*id.* at 103). Donna Smallwood, Parma's Senior Citizen Director, testified that some senior citizens asked her whether blacks would be moving into the Parmatown Woods project (Smallwood dep. 153-157). As Smallwood put it, people were concerned about whether the building would be "open to anyone" (*id.* at 158).

The evidence leaves no doubt that the prospective racial make-up of Parmatown Woods was of concern to Parma public officials and their constituents. The fear that blacks might reside in Parma was a decisive source of opposition to Parmatown Woods.

3. *The Rejection of Parmatown Woods*

The fear of blacks moving into Parma was, of course, not the sole source of opposition to Parmatown Woods. The relationship that existed between Parma officials and Forest City could not be characterized as overly friendly. A credibility crisis had erupted when Forest City unilaterally changed its plans for Parmatown Tower sfrom a six-story to a ten-story building (Dunning dep. Ex. 1). There also was some concern that Forest City was going back on its promise to build "high-quality" units (*id.*) and that it had misrepresented or furnished inaccurate facts to the City Council (Tr. 277-280).

In addition, considerable confusion developed among Parma officials concerning the nature and purpose of the Parmatown Woods project. HUD Secretary Romney, in a letter to Representative Minshall which was forwarded to Mayor Petruska, described Parmatown Woods as an

Operation Breakthrough project consisting of two phases: elderly and low or moderate-income families (Def. Ex. W). However, the Regional Planning Commission, in a letter addressed to Mayor Petruska and dated October 7, 1971, stated that except for the use of the same construction techniques "there is no relationship between Operation Breakthrough and the senior citizen project, Parmatown Woods." (Def. Ex. Y). Two other letters from HUD officials to Mayor Petruska, dated October 14, and October 29, attempted to clarify the expression "Operation Breakthrough" and the status of Parmatown Woods (Def. Ex. AA, AC). Adding to the confusion was an ongoing political campaign in the fall of 1971, in which certain of Parma's public officials believed their stands on specific issues, including the Parmatown Woods proposal, were being misstated by their opponents and the press (Petruska dep. 199-200).

During this period of confusion and controversy, the plans for Parmatown Woods were reviewed by personnel at HUD and by local officials in the Parma Building and Engineering Departments. In the summer of 1971, a project analysis was submitted to HUD. On August 5, 1971, HUD officials appraising the project requested assurances from Forest City that 201 parking spaces would be acceptable to the City of Parma. HUD also requested assurances that a proposed street from the project site to Day Drive would be dedicated to and accepted by Parma (Def. Ex. T). HUD discussed numerous other problems with Forest City.[48] A conceptual plan submitted by Forest

48. Communications between HUD and Forest City in the summer and fall of 1971 showed that on June 10, 1971, the architectural exhibits were not acceptable for feasibility processing because there were some problems regarding certain aspects of the access road (Def. Ex. L). On July 16, 1971 a cost calculation discrepancy was discovered and the plans did not show any covered parking spaces (Def. Ex. P).

City on August 25, 1971 finally was found acceptable by HUD on October 26, 1971 (Def. Ex. AB).

Parma officials received the initial applications for building permits for Parmatown Woods on July 30, 1971. The building permit applications were for two ten-story buildings containing 201 units each (Gov. Ex. 64, 65; Vittardi dep. 49, 51). In late August, Forest City was advised by the Safety Director of Parma that the building permits could not be issued because the plans were incomplete (Gov. Ex. 55).

In early October 1971, Forest City submitted revised building plans for Parmatown Woods to Parma officials. The plans were given to Russell Reinke, the City Engineer, for his review and criticism (Reinke dep. 113). Reinke began to review the Parmatown Woods plans but stopped when he came across a problem with the street on which the proposed development was to be built: a street had not been dedicated to the City and accepted by the City Council as required by the Planning and Zoning Code (Tr. 1254-1255; Reinke dep. 114-115). It is Reinke's normal procedure to stop reviewing any plans as soon as he comes across a major deficiency. In the Parmatown Woods plans, that major deficiency was the lack of a street dedication and acceptance (*id.*). After his review of the plans stopped, Reinke returned the plans to the Building Commissioner and informed him that he could not proceed with the engineering review because of the street dedication problem (Gov. Ex. 56; Tr. 1218, 1342). On the next day, October 7, 1971, the Building Commissioner notified Forest City of the street dedication problem and of the fact that processing of the Parmatown Woods proposal could not be completed (Gov. Ex. 63; Tr. 1219; Vittardi dep. 63-65).

Forest City resubmitted applications for building permits for Parmatown Woods on October 26, 1971. With

the exception of a change from 201 to 202 units in each building, the applications were identical to the ones submitted by Forest City on July 30, 1971 (Gov. Ex. 57, 58). The second set of plans was given to the City Engineer to review (Tr. 1219-1221). It was during this review that the Engineer, Mr. Reinke, departed from his normal plan review procedure (Tr. 1256-1257). Apparently not satisfied that the street dedication problem was sufficient grounds for rejection of the proposal, Mr. Reinke conducted a far more detailed review of the plans and uncovered several problems with the parking specifications (Reinke dep. 114, 117-118; Tr. 1220-1221; Gov. Ex. 67).

On October 28, 1971, Reinke again returned the Parmatown Woods plans to the Building Commissioner, notified him of deficiencies in the plans, and recommended that the plans be rejected and returned to the developer along with the building permit application (Tr. 1200-1221; Reinke dep. 117-118; Gov. Ex. 67). On November 3, 1971, the Building Commissioner did just that (Gov. Ex. 70; Tr. 1223; Vittardi dep. 63). After its second set of plans was rejected by Parma Forest City ceased submitting revisions (Reinke dep. 175), and there was no further communication between Forest City and Parma concerning Parmatown Woods (Tr. 1222, 1346; Reinke dep. 175).

Parma contends that the decision to reject the Parmatown Woods proposal was made in accordance with normal procedures and regulations. Parma thus claims that the building permits would have been denied even if the intense opposition to the housing development on racial grounds had not been present. The Court finds otherwise because Parma officials, reacting to racial considerations, departed from their normal practices in determining to reject the Parmatown Woods building permit application.

The testimony of Messrs. Reinke and Vittardi reveal a system where, in the words of Mr. Reinke, things are done both "sometimes formally [and] sometimes informally" (Reinke dep. 111). Building permits, for example, were denied orally as well as in writing (Vittardi dep 54). If building plans were acceptable, the applicant also was notified either verbally or in writing (Vittardi dep. 37). Daily contact with developers was carried out on an informal basis with no set routine to be followed (Vittardi dep. 45; Reinke dep. 189-190). At times, Parma initiated these contacts with developers and, at other times, developers called the City (Reinke dep. 106-107, 189-190; Vittardi dep. 45, 113). Parma's treatment of projects like the Regency Towers, Midtown Apartments, Parmatown Towers and Parmatown Gardens is further evidence that the City did not strictly adhere to formal procedures and regulations. Instead, a "spirit of cooperation" (Reinke dep. 123) existed between the City's building department and the local developers.

Against this background of informality and cooperation, the manner in which the Parmatown Woods proposal was handled was an aberration. Certainly Forest City's submission of incomplete plans was not a rare occurrence. Incomplete plans had been submitted for practically every apartment development in Parma, and officials had permitted revisions to be made (Vittardi dep. 43). In the case of Parmatown Woods, however, no officials of the Building Department bothered to contact Forest City about problems with the plans or to see if the problems could be worked out informally. In the past, Mr. Reinke had called Forest City when problems had arisen with one of its developments (Reinke dep. 44), and he knew many persons at Forest City (*id.* at 43). Jerry Vittardi also had previously contacted Forest City personnel on many occasions (Vittardi dep. 47-48). Reinke even had

gone to the Forest City offices for a conference on at least one occasion, and he had meetings with Forest City officials in his office ten or more times (Reinke dep. 45). These facts lead the Court to find totally incredible Mr. Reinke's testimony that he did not consider calling Forest City after he had rejected the Parmatown Woods plans for a second time because he "didn't know who to contact" (*id.* at 111-112).

This does not mean that there were not problems with the plans that were submitted to the City. But instead of trying to work the problems out informally, or taking other actions to accommodate the developer, Parma officials simply seized on the problems and rejected the proposal outright. This action is totally inconsistent with other instances that have been noted where building permits were issued for high-rise apartments before complete plans had been submitted or approved by city officials. *See* pp. 45-50, *supra*. Indeed, it would be difficult to imagine a more clear-cut case of disparate treatment than the denial of the building permits for Parmatown Woods on the one hand, and the granting of a building permit for Parmatown Towers on the other. Each incident occurred in 1971, and each involved the same developer. And, in each case, the streets on which the projects were to front had not been dedicated and accepted. Despite the similarities, the necessary building permit was issued for Parmatown Towers and was denied for Parmatown Woods. The distinguishing factor between the projects is that Parmatown Woods was not a "luxury" development, and consequently its construction might have enabled blacks to come into Parma.

The City of Parma argues that Russell Reinke, the City Engineer, and Jerry Vittardi, the Building Commissioner, are merely mechanical processors of building permit applications. It is claimed that their function in the building

review process consists of strictly adhering to written guidelines, and that they have no authority to modify any of the requirements of the ordinances of Parma.[49] But this line of argument disregards the informal nature of the reviewing process, ignores the discretion vested with Parma officials to work out accommodations with developers, and is totally inconsistent with the facts presented to the Court.

4. *The Effects of the Rejection*

In 1972, after its proposal for Parmatown Woods was rejected by Parma, Forest City contacted HUD and succeeded in building a Section 236 project in adjacent Parma Heights (Tr. 296; Def. Ex. BA). Called Independence Place, this new apartment complex is basically the same project that was rejected by Parma and is located ap-

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49. At trial, Parma claimed that the Parmatown Woods plans submitted by Forest City were not in conformity with three sections of the Planning and Zoning Code: §1101.06(d), which provided that no building permit be issued by the Building Commissioner until the adjoining street had been dedicated and accepted; §1197.03, which specified that for a building such as Parmatown Woods there be a minimum of three-quarters of a parking space per unit in an enclosed garage as part of the main building and which required that multi-family buildings provide for 2 1/2 parking spaces per unit; and §1163, which provided that no property zoned for non-residential use should be used for residential purposes. The alleged non-conformity with the requirements of §1163 appears to be a reason advanced solely for trial purposes. This post-hoc rationalization of Parma's actions was never communicated to Forest City (*see* Gov. Ex. 70). Similarly, Parma did not rely, until trial, on nonconformity with the provision of §1197.03 requiring 2 1/2 parking spaces per unit. Forest City officials had indicated at the time they presented Parmatown Woods to the Planning Commission that they would seek a variance (Gov. Ex. 59), and Parma officials fully expected such a variance to be sought (Tr. 1345). It is inconceivable that a major housing project would be rejected on account of noncompliance with parking requirements if the City, in good faith, expected a variance to be requested and intended to grant it. Finally, the treatment accorded Parmatown Towers indicates that the requirements of §1101.06(a) for a dedicated and accepted street were flexibly applied by Parma officials.

proximately 100 yards from the proposed Parmatown Woods site (Tr. 602, 617-618, 1418-1419).[50] There are presently no black residents of Independence Place (Tr. 313-314, 1423; Def. Ex. AX, AY). As a result, Parma contends that there would have been no blacks living in Parmatown Woods either, and therefore that the rejection of the project had no segregative effect.

The lack of blacks in Independence Place can be attributed to several factors. One factor which may have affected black occupancy at Independence Place was the manner in which the Affirmative Marketing Plan was implemented by Forest City for that building.[51] HUD requires Affirmative Marketing Plans for all Section 236 projects where the project is to be located outside of areas

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50. Parma defends its conduct in rejecting the Parmatown Woods proposal by stressing that the record contains no evidence regarding Forest City's reasons for transferring the basic proposal from Parma to Parma Heights. The fact that Independence Place was built only 100 yards from the site initially proposed in Parma supports only one explanation. Forest City concluded that the project could not be constructed in the City of Parma. Forest City, a major developer in Parma, was obviously aware of the intense racial opposition to Parmatown Woods, *see* pp. A98-A107, *supra*, and the impossible restrictions which the Parma Planning Commission had imposed on construction of the project. *See* pp. A103-A104, *supra*. Forest City could not have ignored the significance of the timing of the rejection of the Parmatown Woods plans only one day after a general election in which two ordinances were enacted which destroyed any hope of constructing Parmatown Woods in Parma. *See* pp. A117-A124, *infra*.

51. Parma relies on Forest City's Affirmative Marketing Plan for Parmatown Woods to show that the rejection of Parmatown Woods had no discriminatory effect. The Plan stated partly that "[i]t is expected that only a small number of minority people will be interested in living in the proposed project. The majority of tenants are expected to be from the ethnic groups who are prominent in the project area at this time." (Def. Ex. A). The Affirmative Action Plan nowhere speaks of the complete absence of blacks. In addition, HUD was critical of Forest City's effort under the plan. Finally, Parma's racially exclusionary image, *see* pp. A71-A74, *supra*, may account for the low expected numbers of minorities.

of minority concentration. This is done in order to attract minority families from nearby metropolitan areas (Tr. 316, 292). An Affirmative Marketing Plan was in effect for Independence Place although the extent of this plan is not shown in the record (Tr. 297, 1422-1423). The record does show that Forest City had come under criticism by HUD for its Affirmative Marketing Plans and its method of carrying them out at approximately the same time that the Parmatown Woods and Independence Place proposals were being considered (Tr. 286; Def. Ex. AJ).

At one point, HUD criticized Forest City for not complying with HUD affirmative marketing guidelines and regulations and for not meeting equal opportunity goals (Def. Ex. AJ). Because HUD judges affirmative marketing plans in terms of efforts instead of results (Tr. 285), it must be assumed that HUD's criticism of Forest City occurred as a result of a lack of effort on the part of Forest City in carrying out its affirmative marketing obligations. In light of this, the Court finds that the lack of blacks at Independence Place is due in part to a lack of effort by Forest City in attempting to attract minority tenants to the Parma Heights project.

A second factor affecting minority occupancy at Independence Place is Parma's racially exclusionary image as an all-white city hostile to blacks and those who might bring blacks to Parma. Paul Cassidy, who has been the Mayor of Parma Heights for the past 22 years (Tr. 1410), testified at trial about the confusion that exists in Cuyahoga County as to the difference between Parma and Parma Heights (Tr. 1427-1428). The extent of this confusion was made clear to him during his 1968 campaign for Commissioner of Cuyahoga County. During the campaign, Cassidy spoke to many groups of blacks, and even though he would be introduced at these meetings as being

from Parma Heights, people thought that he was from Parma. This was made clear to Mayor Cassidy because he repeatedly was questioned about the positions which Parma had taken (Tr. 1427-1429). From blacks especially, he learned that Parma had a reputation as being anti-black (Tr. 1428). On more than one occasion he was accused of being racially-biased because those making the accusations thought he was from Parma (Tr. 1429).

Blacks have not moved to Independence Place since they, like other groups, are reluctant to move into an area where they sense that the neighborhood is hostile to them and that they will not feel welcome. Given the confusion existing among blacks as to the difference between Parma and Parma Heights, the fact that Parma's actions concerning Parmatown Woods were publicized so highly, and the fact that Parma's reputation for hostility to blacks was well known, it is not surprising that blacks decided not to live in Independence Place.

A final factor contributing to the absence of blacks at Independence Place was the refusal of Parma Heights to allow those living in the building to get federal rent supplements (Tr. 1419; Def. Ex. AD). A Section 236 project with rent supplements normally attracts a larger proportion of low-income persons than a normal Section 236 project because the rent supplement income levels are the same as those required for public housing eligibility (Tr. 566-567). At the time the Parmatown Woods and Independence Place proposals were submitted by Forest City, Section 236 projects were encouraged to have 20% rent supplements (Tr. 602). If Parmatown Woods had been built in Parma and rent supplements were utilized, it is likely that some low-income minority persons would have become tenants there. While the Court cannot conclude that any specified number of blacks would have re-

sided in Parmatown Woods if it had been constructed, it is convinced that the denial of the building permits eliminated even the possibility of affordable housing for many low-income minorities, and thereby served to strengthen Parma's already strong racially exclusionary image.

D. PARMA'S LAND-USE ORDINANCES

1. *The Height and Voter Approval of Low-Income Housing Ordinances*

The rejection of Parmatown Woods on November 3, 1971, occurred only one day after a general election in which the electorate voted upon two issues which had grown out of the months-long opposition to that low-income housing project. On November 2, 1971, the voters of Parma enacted two ordinances which appeared on the general election ballot by initiative petitions. One ordinance, General Building Regulations §1529.37 (Gov. Ex. 68) limits the height of all future residential structures to 35 feet. The other Building Code §1528 (Gov. Ex. 69), requires approval by the Parma electorate of (1) the development, construction or acquisition in any manner of a subsidized housing project by a public body, or (2) any participation by private individuals or non-public bodies in any program in which the Federal Government pays all or part of the rent of low-income families.

Parma contends that the enactment of these ordinances occurred due to non-racial opposition by Parma residents to high-rise apartments and the possibility that federally-subsidized housing units might be built in the City. While numerous non-racial factors influenced the passage of the ordinances, the Court finds that the fear that blacks would move into Parma was an important motivation.

Opposition to the high-rise zoning classification existed at the time the classification was created in 1963 (Tr. 1177-1178, 1319; Kopchak dep. 88), and continued to exist until passage of the 1971 ordinance. Parma argues that there were several non-racial grounds on which residents objected to high-rise buildings over the years. Specifically, high-rise buildings were mentioned as being fire hazards (Tr. 1273; Kopchak dep. 183), creating traffic congestion (Kopchak dep. 31), causing ecological and aesthetic damage (Dunning dep. 38; Kopchak dep. 31), and overloading sewage facilities (Tr. 1270-1271). While the Court believes that there were Parma residents who sincerely opposed high-rise apartments for these reasons, there is no evidence in the record that any of the above problems actually existed. Additionally, persuasive evidence indicates that racial considerations contributed decisively to passage of the ordinances.

Regarding the belief that high-rise apartment buildings would constitute a fire hazard, the evidence indicates that such buildings are not inherently more unsafe than low-rise buildings (Reinke dep. 153-54). And in any event, Parma does have fire equipment capable of handling emergencies in high-rise buildings (Kopchak dep. 181). The fact that Parma officials did not inquire about the fire hazards of high-rises (Petruska dep. 230; Dunning dep. 35, 56-58; Smallwood dep. 69, 75-77), even when the ten-story Parmatown Towers was constructed, seriously undercuts the weight to be accorded to the expressed concern.

The City of Parma also argues that high-rise apartments located in the area proposed for Parmatown Woods would have caused traffic congestion problems. No evidence was introduced by the City, however, to show that congestion would have occurred if Parmatown Woods had been built. Indeed, no study was done by Parma to show

how construction of the project would have affected the flow of traffic in the area (Reinke dep. 151-152).

Parma also contends that the sewer system in the Parmatown Towers-Parmatown Woods area was inadequate to handle the increased demands that would have existed had Parmatown Woods been constructed (Tr. 1270-1271). The evidence indicates, however, that no one ever asked the City Engineer, Mr. Reinke, who has responsibility for the sewers (Reinke dep. 134), to study any possible sewer problem and he never did so independently (Reinke dep. 147-148; Dunning dep. 37-38). In fact, the record shows that the construction of additional apartments in the Parmatown Towers-Parmatown Woods area would not have affected adversely the sewer system (Reinke dep. 139-140, 142-143).

Finally, Parma argues that construction of high-rise apartments in the Parmatown area would be aesthetically and ecologically harmful (Dunning dep. 38; Kopchak dep. 28). Again, no evidence was presented to indicate that such damage would have occurred had Parmatown Woods been built and no studies of possible damage were made (Kopchak dep. 31).[52]

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52. It is interesting to note that the aesthetic and ecological objections of Evelyn Kopchak, Parma City Councilwoman, to high-rise buildings in the area of Parmatown Woods (Kopchak dep. 28) apparently only went as far as the boundaries of the City of Parma. The land on which Parmatown Woods was to be constructed is in the Parma city ward which Ms. Kopchak represented when she was on the Parma City Council Council (*id.* at 60). After the Parmatown Woods proposal was rejected by the City of Parma in November of 1971, Forest City built basically the same project in Parma Heights called Independence Place (Tr. 602, 617-618). Independence Place was built only about 100 yards away from the site in Ms. Kopchak's ward where it had been proposed originally (Tr. 1418-1419; Petruska dep. 74). In spite of this, Kopchak did not express any objections, aesthetic or otherwise, to Parma Heights concerning the proposed construction of the Independence Place high-rise apartment complex (Kopchak dep. 165).

The absence of evidence substantiating the objections to high-rise apartments, together with the fact that the initiative petitions for the ordinances were circulated at the same time Parmatown Woods was being considered and debated often in blatantly racial terms (Gov. Ex. 61), supports the finding that race discrimination was a motivating force behind passage of the ordinances. While three high-rise apartment buildings—Regency, Midtown and Parmatown Towers—were built in Parma during the time of this apparent opposition to high-rise buildings, only Parmatown Woods, a federally subsidized low-income housing project, was not built. There was no opposition whatever to the three former buildings on the basis of the anticipated race of their occupants, but this subject dominated the debate over Parmatown Woods.

Some of the same people who objected vehemently to Parmatown Woods were sponsors of the initiatives to impose height and voter approval limitations (Sands dep. 83-84). City officials and sponsors of the initiatives anticipated that, if passed, they would cover Parmatown Woods and any other low-income or federally subsidized housing proposals (Tr. 1276-1277; Kopchak dep. 152-154; Dunning dep. 202).[53] Mayor Petruska, characterizing the future

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53. Parma argues that Parmatown Woods would not have been affected by these ordinances because (1) the application for that project was pending at the time of their passage, and (2) only those ordinances in effect at the time the application was filed would apply to that application. The Court is not persuaded by this. On November 3, 1971, Forest City's plans for Parmatown Woods were "rejected" and the entire building permit application was returned to Forest City (Gov. Ex. 70). At that point, the Parmatown Woods application was no longer pending. A new application would have had to have been submitted by Forest City in order for Parma to again consider the proposal. Any submission by Forest City after November 3, 1971 would have occurred while these ordinances were in effect and there is no reason to believe that a new application would not have to comply with all laws then in effect in Parma. This is consistent

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of Parmatown Woods as "speculation," urged Parma citizens to vote for the initiatives because "I am completely opposed to any type of public or low-income housing in the city of Parma" (Gov. Ex. 75, p. 2).

The Court already has found that racial discrimination was an important motivating factor in the opposition to Parmatown Woods in particular, and to public and low-income housing in general. Passage of the height and voter approval of low-income housing ordinances was part of this opposition, and racial discrimination again played a decisive role.

As a practical matter, the height and voter approval ordinances make the construction of any public or low-income housing very difficult. The 35-foot-height limitation makes the construction of federally subsidized low-income housing economically impractical (Tr. 795-798). Land available for multi-family apartments is generally far too expensive to support low and moderate-income family housing. For this reason most developers try to use federal programs like Section 236 to build high-rise buildings which serve both families and the elderly (Tr.

Footnote continued—

with the testimony of John Sands, former Parma City Councilman and Assistant to the Mayor, who stated that as long as a building permit application meets the zoning code, an ordinance taking effect while the application was pending would not affect it (Sands dep. 52). This is also consistent with the trial testimony of Andrew Boyko, Parma Law Director, who testified concerning Parma's actions with regard to the Midtown Apartments in 1969 (Gov. Ex. 72, 73). Boyko at that time issued an opinion that a newly enacted ordinance in Parma would not affect a building permit application for Midtown which had been filed prior to the effective date of the ordinance. The Midtown application, however, had not been rejected and returned to the developer. In fact, construction on two of the three Midtown buildings had been approved, and the approval for the third building was only "withheld" with no rejection (Tr. 1166-1168; Gov. Ex.72, 73).

796). The rent structure which is available under government housing programs does not make it economically feasible to construct low-rise low-income housing in Parma (Tr. 797).

The low-income housing voter approval ordinance, Building Code §1528, is another formidable obstacle to the development of low-income housing. The language of the ordinance is so all-inclusive that it appears to require voter approval for the development of any type of subsidized low-income housing by a public body or housing authority, and for the participation by private persons in any federal program which subsidizes rent. This ordinance even appears to encompass Section 8 housing, which is the main subsidy program administered by HUD at the present time (Tr. 554).[54] Thus, on its face the voter approval ordinance requires any prospective developer of low-income federally subsidized housing to face an uncertain referendum after undergoing the time and expense of obtaining land and having its plans approved by Parma officials.

The deterrent effects of Parma's height and low-income housing voter approval ordinance were magnified even further by the events surrounding their adoption. Developers of federally-subsidized housing were aware of the fate of Parmatown Woods and of the statements of Parma officials that blacks are not welcome in Parma (Tr. 795). The low-income housing voter approval and height ordinances were other unmistakable signals to developers of a climate of prejudice against any government-subsidized housing (Tr. 791-792). For these reasons, developers concluded that it would be a waste of time and

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54. The Court notes that forty-eight residents of Parma currently participate in Section 8 housing, and no evidence exists that voter approval has been sought.

resources to acquire land and make proposals for low-income housing. Given the open attitude of hostility to blacks and federally subsidized housing in Parma, developers concluded that the proposals would either be blocked by the height requirement or meet certain defeat in the polls (Tr. 792).

The actual effect of the height and low-income housing voter approval ordinances has been devastating.[55] Since these ordinances were passed, no residential construction in Parma has exceeded 35 feet; no one has proposed or requested a variance to construct a higher residential building (Tr. 1251-1252; Vittardi dep. 120; Reinke dep. 198); no federally subsidized housing has been built in Parma; and not a single proposal for such housing been submitted (Tr. 1252, 1392, 573; Reinke dep. 201; Dunning dep. 177; Smallwood dep. 124).

2. *The Parking and Zoning Change Ordinances*

The government contends that two other Parma ordinances have a racially exclusionary effect and therefore violate the Fair Housing Act. One of the ordinances, Planning and Zoning Code §1197.03, requires 2 1/2 parking spaces per dwelling unit; the other, Building Code, §1229.01, requires voter approval for any change in the zoning code or in existing land uses. The record does not show that either of these ordinances was passed for the purpose of excluding minorities. Yet the effect of

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55. Parma seeks to contest the effect of the ordinances by noting that there is no evidence in the record of any proposed projects for low and moderate income families which were deemed to be impossible to build because of passage of the ordinances. This ignores the crucial fact that because the ordinances effectively preclude the construction of federally subsidized housing, no developer would waste money formulating an uneconomical proposal. Of course, the Parmatown Woods proposal was rejected the day after the ordinances were enacted.

both ordinances is to make the construction of low-income housing substantially more difficult and thereby preserve the all-white character of the City.

The requirement of 2 1/2 parking spaces per dwelling unit for apartment buildings is the highest parking requirement in the City for residential structures (Tr. 1242-1243). Only one parking space per unit is required for one and two-family homes, and only four-fifths of a space per unit is required for hotels and rooming and lodging houses. Planning and Zoning Code §1197.02(b). Even condominium developments, which are also multi-family housing, are required to have only two parking spaces per unit. Planning and Zoning Code §1159.07(b).

Parma has offered no explanation as to why it requires 2 1/2 spaces per apartment unit.[56] It is clear that Parma's 2 1/2 space requirement is abnormally large compared to the parking requirements of other jurisdictions in the area (Tr. 564).[57] Parma's parking requirement also contrasts sharply with the HUD guidelines of one space per unit for Section 236 housing (Tr. 562, 620) and of one space per two units for senior citizen housing (Tr. 619).

The effect of Parma's 2 1/2 parking space requirement has been to inhibit the construction of low-income housing in Parma. Because a higher parking space re-

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56. Typical apartments, even luxury ones, in the Cleveland area are occupied by families needing no more than two cars. The pattern in the Cleveland area is for families or for persons with enough income to own two cars to buy homes and not to live in apartments (Tr. 803).

57. One HUD official could not recall HUD ever allowing more than one and a half spaces per unit of multi-family housing in the ten years he worked in that field (Tr. 620). Another witness with extensive housing experience stated that in the areas in which he had worked 1 1/2 spaces per unit was the highest number of required spaces which he had encountered for multi-family housing; for senior citizen housing, the number could be cut in half (Tr. 801-802).

quirement requires a developer to use more land for an apartment development (Tr. 801, 565-566), it reduces the practicality of dense development (Tr. 801) and makes it less feasible for a developer to construct a housing project under low or moderate-income HUD programs (Tr. 566). Rigid enforcement of the 2 1/2 parking space requirement is one of the ways in which Parma has been able to keep all low-income housing out of the community (Tr. 815).[58]

On November 5, 1974, voters of Parma enacted an ordinance which requires voter approval of any change in existing land uses or land use ordinances. Building Code §1229.01 (Gov. Ex. 87). Under this ordinance, any developer needing a zoning or land-use change to construct low-income multi-family housing is now required to get approval for the change from the Parma voters.

In light of the open hostility which residents of Parma have displayed toward low-income housing in the past, a developer would be extremely reluctant to propose a low-income housing project that would require a zoning change. In fact, no developer has submitted a request for a zoning change to build a multi-family dwelling since the ordinance was enacted (Petruska dep. 286). Significantly, there has been a decrease in residential construction and in building permit applications for residential construction in Parma since the enactment of this ordinance (Vittardi dep. 114-115).

With the passage of this voter approval of zoning changes ordinance, a developer who wants to construct

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58. Parma has made a point of showing that its neighbor, Parma Heights, also has a 2 1/2 parking space per unit requirement for multi-family dwellings (Tr. 1420). There is, however, one significant difference: Parma Heights routinely grants variances to this requirement (Tr. 1430) and in fact granted a variance down to 0.84 spaces per unit to Forest City for Independence Place (Tr. 1421). Since 1971, Parma has not granted a variance to its 2 1/2 parking space requirement (Tr. 1259, 1262).

low-income federally subsidized housing is faced with a Herculean task. First, he has to secure voter approval of his low-income proposal, and face the costly delay inherent in that process. Then, in the unlikely event that he is successful, he will have to face the voters again if a zoning change is necessary to build the project. In any event, he will then be confronted with the prospect of constructing an economically infeasible complex, given the 35-foot-height limitation and the requirement of 2 1/2 parking spaces per dwelling unit from which a variance has never been granted since 1971. In effect, what the 1974 zoning ordinance did to low-income housing was to "add a more difficult hurdle to the already impossible one" (Tr. 799).

The cumulative effect of the four ordinances enacted by Parma is to prevent construction of any low-income housing in the City. Developers will not event attempt to bring low-income public housing proposals to the City, where it is clear that at best they will receive no cooperation from Parma officials, and at worst they will encounter deep-rooted resistance (Tr. 811).[59] This is not to suggest, however, that apartment construction has ceased in Parma since passage of the ordinances. Multi-family housing has been constructed since November 1971 (Tr. 1243), but none of it has been low-income or federally subsidized housing (Tr. 1252, 573).[60]

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59. One Section 236 developer with extensive experience indicated that the awareness of community resistance influenced the decision not to build in Parma. "The judgment not to come to Parma was based on the attitude that we thought was expressed in the initiative petition to pass these ordinances rather than the specific ordinance." (Tr. 815).

60. At least three apartment complexes have been built since 1971. Parmatown Gardens is a garden apartment development by Forest City (Tr. 1244-1245, 1251), which is about 28 feet high (Tr. 1250) and stands on part of the land originally proposed for Parmatown Woods (Tr. 1210; Def. Ex. DJ). The Sandpiper

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E. THE COMMUNITY DEVELOPMENT BLOCK GRANT APPLICATION

The government's final contention is that Parma's conduct in applying for Community Development Block Grant funds was motivated by racial considerations and had the effect of preserving a segregated community. Title I of the Housing and Community Development Act of 1974, known as the Community Development Block Grant Program, 42 U.S.C. §5301 *et seq.*, is designed to bring federal funds for housing and community development to local governments (Tr. 713-714). Its purpose is to provide funds for the improvement of the urban environment, the development of the inner city and the deconcentration of low-income households (*id.*).

Decisions regarding how these funds are to be utilized are made by local public officials and interested citizens. However, one of the requirements imposed by the federal government for a community's participation in the program is that provisions be included regarding the housing needs of lower income families (Tr. 716). In order to insure that the requirement is met, a community must submit a Housing Assistance Plan which sets forth the community's proposals for meeting the needs of lower income families within its political jurisdiction and for providing housing for those "expected to reside" in the community (Tr. 716).[61]

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development is a condominum development about 25 feet high (Tr. 1244, 1250-1251; Vittardi dep. 117-118). The most recent multi-family project constructed in Parma, the Kimberly Park Apartments (Tr. 1244, 1251; Reinke dep. 193-194), consists of luxury apartments, is about 35 feet high, and has tennis courts and a swimming pool (Gov. Ex. 121; Tr. 1248-1249).

61. "Expected to reside" refers to those persons who would be expected to come into a community in order to avail themselves of an opportunity to be close to their employment (Tr. 716).

In late 1974, Mayor John Petruska proposed that Parma apply for Community Development Block Grant (CDBG) funds after he had received information about the creation of the CDBG program from the federal government (Tr. 1349; Petruska dep. 302). A decision was made to apply for CDBG funds and the Regional Planning Commission was requested by Parma to assist the City in the preparation of its application (Tr. 1349). Pursuant to the requirements for the CDBG program, several public meetings were scheduled by the City to get citizen input on Parma's participation in the program (Tr. 756, 1350), and notices were sent to the various media in the Cleveland area advertising these meetings (Gov. Ex. 88; Def. Ex. CQ, CS, CT, CU, CV, CW). The City received many comments from Parma residents concerning how the CDBG funds could be used (Tr. 1350-1351; Gov. Ex. 89; Def. Ex. BG, DG). Some of the suggestions included the need for a new civic center, the preservation of an historic site, the improvement of a hockey rink, the enlargement of the Senior Citizens program, and a center for the treatment of emotional problems (Tr. 1402-1403; Def. Ex. CU, CW).

Following the meetings, Parma officials met with representatives of the Regional Planning Commission and discussed the CDBG application (Tr. 1351-1352, 1388). The discussion centered on the suggestions that had been made at the public meetings and the needs and goals which Parma would include in its application to HUD (Tr. 1351-1352, 1388). After this meeting, the Regional Planning Commission drafted Parma's application (Petruska dep. 303). The decision on what ultimately went into Parma's CDBG application was made by Mayor Petruska and the members of the Parma City Council (Petruska dep. 305).

In late February 1975, the Parma City Council approved submission of the plans (Gov. Ex. 92), and after certification that the project had the appropriate review (Def. Ex. BX), the application was submitted to HUD in April of 1975 (Gov. Ex. 96).

Parma's CDBG application was rejected by HUD because the City did not submit an adequate Housing Assistance Plan. This deficiency in the application, and Parma's adamant refusal to correct it, is further evidence of Parma's consistent opposition to low-income housing and to anything which might serve to alter the virtually all-white character of the City.

Table 15 of Parma's Housing Assistance Plan, submitted as part of its CDBG application, is entitled "Housing Assistance Needs of Lower Income Households" (Petruska dep. Ex. 24). In this table, Parma was required to set forth the low-income housing needs of the City (Tr. 557). The number of Parma low-income households requiring housing assistance in 1975 was listed as 1,537 (Tr. 1381; Petruska Def. Ex. 24). Of this number, non-elderly needs were listed as 778 and elderly needs at 759 (*id.*). Despite having low-income housing needs of over 1500 households in 1975, Parma made no provision for meeting these needs in the first year of the CDBG program. More importantly, Parma made no provision for meeting its 778 non-elderly low-income housing needs at any time (Tr. 1382; Petruska dep. Ex. 24). In Table 16 of Parma's Housing Assistance Plan, entitled "Annual Goal for Housing Assistance," Parma wrote that its first year goal for assisting low-income households was *zero* (Tr. 1354, 1382; Petruska dep. Ex. 24). The number of additional low-income households expected to reside in the community also was listed as *zero* (Tr. 1388; Petruska dep. Ex. 24)

Parma's application was disapproved by the federal government because of the City's failure to provide low-income housing assistance goals. HUD found a zero figure under "Additional Households Expected to Reside" in Parma to be plainly inconsistent with generally available facts and data which indicated that additional lower-income households could be expected to reside in Parma as a result of existing employment opportunities there (Gov. Ex. 94, 97, 98, 100, 101, 103, 104). Readily available data from the 1970 United States Census indicated that 5,843 low-income persons resided outside of Parma and worked in the City (Gov. Ex. 94). In addition, HUD found Parma's "zero" goal for housing assistance to be totally at odds with its stated low-income housing need of 1537 households (*id.*). HUD officials advised the City of Parma that its CDBG application was deficient in these two respects and that the application would be denied if those deficiences were not corrected (Gov. Ex. 98). Parma chose not to revise its application for CDBG funds (Petruska dep. 317-318), and the application was finally rejected by HUD on June 27, 1975 (Gov. Ex. 104).

Parma has advanced three non-racial reasons to explain why the inadequate Housing Assistance Plan was submitted with the CDBG application. First Mayor Petruska claims that the City was not sure of the accuracy of the census figures used by the Regional Planning Commission in preparation of the application and had to verify these figures through various studies before proceeding further (Tr. 1384-1385). Yet Mayor Petruska personally certified the accuracy of everything in the application (Tr. 1390), and Parma relied on census data throughout the application. No fewer than 11 of the 16 tables in Parma's CDBG application utilized figures from the 1970 Census, concerning such things as age of housing, condi-

tion of housing, income of families, and number of elderly residents. Census figures showing the need for assistance to low-income elderly households in Parma apparently were considered accurate enough by Parma to warrant proposing senior citizen housing in its application (*See* Table 16, 2 pages before Table 15 of Parma's CDBG application, Petruska dep. Ex. 24). So were the figures in Table 15 which indicated a low-income housing need.

Parma decided to reject only those census figures which indicated a need for low-income housing. However, the City has advanced no explanation as to why there should be selective inaccuracy in the published census data it chose to utilize. In the absence of such an explanation, this Court is not persuaded that Parma was actually or reasonably concerned about inaccurate data. Rather, the clear inference is that Parma was opposed to the construction of low-income housing not limited exclusively to Parma's elderly residents.

The second explanation advanced by Parma to justify its decision to exclude plans for low-income housing assistance in the CDBG application is that the application itself specified that a certain amount of dollars were to be used to conduct a study of the low-income housing needs of the community (Tr. 1354-1355, 1385). However, the only provision in Parma's application concerning a study of housing needs appears in Part C of Table 16 of Parma's Housing Assistance Plan (Petruska dep. Ex. 24). In Table 16, the City proposes to rehabilitate apartments for senior citizens in the fifth and sixth years of its community development program and to start "engineering studies" in the third year of the program. Nowhere else in Parma's application is there any mention of further study of housing needs. It is questionable whether the "engineering studies" contemplated in the plan would

involve an evaluation of the housing needs of Parma. In any case, it is clear that these proposed studies refer only to senior citizen housing. The Court finds that Parma's CDBG application nowhere addresses Parma's stated low-income housing need of 778 non-elderly households; nor does it propose further study of such a need.

Parma's third reason for submitting an inadequate plan is that its "zero" goal of housing assistance for low-income households reflects community needs as expressed by the Parma public at public hearings. The City claims that low-income housing was not indicated as being such a need (Tr. 1388, 1390). However, the notices of proposed CDBG public metings which were prepared by Parma officials never mentioned that housing of any kind was to be a topic of discussion (Def. Ex. CS, CT, CU, CV, CW; Gov. Ex. 88, 91; Tr. 1389-1390). While the need for low-income housing was noticeably omitted as a topic of discussion, numerous other topics were specified, such as construction of a civic center and improvement of hockey facilities. In the absence of notice that low-income housing needs would be discussed, it is not surprising that the community did not indicate the existence of such needs at the CDBG hearings. The Court rejects Parma's contention that the lack of an expressed need for low-income housing at two public hearings means that no such need existed. The evidence amply indicates that there was a definite need for low-income housing in Parma.

The three reasons advanced by Parma to justify its Housing Assistance Plan are insufficient to account for the actions undertaken. Even if credible, they do not explain the City's refusal to revise the CDBG application once HUD's objections became known. The evidence reveals that the real explanation behind Parma's action in the CDBG application was a deep abhorrence of low-income

housing because it might enable "outsiders" to reside in the City.

During the period of time in late 1974—early 1975, when a possible application by Parma for CDBG funds was being discussed, suggestions from citizens on the possible use of such funds were received by the City (Tr. 1350-1351). In a January 13, 1975 letter enclosing such suggestions, it was revealed that some opposition to participation in the CDBG program had surfaced because of a fear that the program "was a devious plot to slip low-cost housing into Parma through the back door" (Gov. Ex. 89). That this was not just an isolated occurrence and was made clear a month later, when on February 27, 1975, a Special Meeting of the Parma City Council was held to discuss the proposed application of the City of Parma for CDBG funds (Gov. Ex. 92). After discussion on the merits of the application, a Council vote was held on whether or not to permit the City to apply for the funds. The vote was in favor of the application, but a further concern over what Parma was getting itself into by applying for the funds was voiced by one of the Parma City Councilman, Gerald Boldt, at the meeting. Boldt voted against the application because he felt that Parma, through its CDBG application, was "getting involved in an area where we are seeking Federal subsidies in low-income housing" (*id.* at p. 4). Although other Council members expressed some concern over the possibility of a "string" being attached to receipt of CDBG funds, a majority of the Council apparently was assured that this was not the case by Mayor Petruska, who stated that he would not advocate consideration of the program if he didn't believe in what he had publicly stated the program stood for. Accordingly, the Council approved the application (Gov. Ex. 89).

What Mayor Petruska apparently thought the CDBG program stood for, and what the City Council voted for on February 27, 1975, was for the right of Parma to receive federal funds while ignoring its stated low-income housing needs and the needs of those low-income persons who might want to live in Parma (Tr. 1356; Gov. Ex. 99). In a letter to HUD dated May 14, 1975 (Gov. Ex. 99), Mayor Petruska wrote about the City's need for senior citizen housing[62] and its opposition to HUD regulations which require that low-income needs be met in order for the CDBG application to be funded. In his letter, Mayor Petruska wrote in part:

> [W]e do not feel an obligation to provide for any others across this nation since they have their own choice of mobility, they have their own choices of where they care to reside, and it is their obligation to furnish for themselves a location for a residence. We in Parma will take care of those in Parma . . .

Mayor Petruska was not alone in his desire to avoid low income housing and the opportunities such housing might provide to "outsiders." Parma's Congressman, Ronald Mottl, echoed Petruska's sentiments when he wrote to HUD Secretary Carla Hills about preserving the "character" of Parma (Def. Ex. BN).

There is little question that Parma's character—its all-white character—was highly valued by the residents of the City and by City officials. Construction of low-income housing was opposed because it meant the blacks might

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62. In his letter Petruska speaks of the "strong need" for senior citizen housing evidenced at public CDBG hearings (Gov. Ex. 99, p. 1). If such a strong need indeed was discussed at these hearings, it is peculiar that the defendant's notices of CDBG hearings, which set forth the subjects which had been brought out at a previous meeting, make no mention of this need (Def. Ex. CS, CT, CU, CV, CW; Gov. Ex. 88, 91).

move into Parma. *See* pp. A86-A90, *supra*. To maintain the City's all-white character, millions of dollars in federal funds were rejected by the citizens of the community and their elected officials. The effect of this rejection was to further insulate the community against low-income housing and increased opportunities for minority housing (Tr. 719).

The receipt of CDBG funds would have helped the City of Parma to provide an equal opportunity in housing for all races (Tr. 715). By rejecting the funds, Parma assured that it would continue to be an almost totally segregated community. The Court finds that Parma's submission of an inadequate CDBG application and its refusal to amend that application were intended to foreclose, and in fact have foreclosed, housing opportunities that would otherwise have been made available to all low-income persons, including blacks.

IV. VIOLATIONS OF THE FAIR HOUSING ACT

The government is authorized to bring this lawsuit under Section 813 of the Fair Housing Act, 42 U.S.C. §3613.[63] Under Section 813, the Attorney General is permitted to sue when there is "reasonable cause to believe

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63. Parma's contention that this action is time-barred by Section 812 of the Fair Housing Act, 42 U.S.C. §3612, misconceives the relationship between Sections 812 and 813, as well as the nature of the government's pattern or practice case. The simple heading of Section 812 - Enforcement by private persons - demonstrates the inapplicability of its statute of limitations to a suit by the Attorney General under Section 813. Additionally, the policies and practices challenged by the government can not be limited to a single incident occurring at a specific time. To establish a pattern or practice, the government must be able to challenge decisions which have been made over a period of time. The practical effect of accepting Parma's position would be to limit the Attorney General to patterns and practices which existed no longer than 180 days prior to the filing of a lawsuit. Such a position is clearly inconsistent with a broad construction of the Fair Housing Act. *See Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by [the Act], or that any group of persons has been denied any of the rights granted by [the Act] and such denial raises an issue of general public importance."[64]

The government contends that the City of Parma violated the Fair Housing Act by both engaging in a pattern and practice of resistance to the full enjoyment of rights granted by the Act, and by denying rights granted by the Act to groups of persons. The rights granted by the Act which the government claims Parma has resisted or denied are specified in two separate sections: Sections 804(a) and 817, 42 U.S.C. §§3604(a) and 3617. Section 804(a) provides in part that "it shall be unlawful . . . to make unavailable or deny . . . a dwelling to any person because of race, color, religion, or national origin." Section 817 provides in part that "it shall be unlawful to . . . interfere with any person in the exercise or enjoyment of, . . . or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section . . . 3604 . . . of this title." It is the government's contention that Parma's persistent resistance to the construction of low-income housing in the City violates the provisions of both of these sections.

To demonstrate a pattern or practice of resistance to the enjoyment of the rights secured by Sections 804(a)

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64. The Attorney General's determinations of reasonable cause and general public importance are not reviewable by the courts. *United States v. Northside Realty Associates*, 474 F.2d 1164, 1168 (5th Cir. 1973); id., 501 F.2d 181 (5th Cir. 1974), *rehearing denied*, 518 F.2d 884 (5th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 125 (5th Cir. 1973), *cert. denied*, 414 U.S. 826 (1973).

and 817, the government must prove more than an isolated incident of unlawful discrimination. *United States v. Pelzer Realty Co.*, 484 F.2d 438, 445 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *United States v. Reddoch*, 1 EOHC §113,569 (S.D. Ala. 1972), *aff'd*, 467 F.2d 897 (5th Cir. 1972). The unlawful discrimination, in other words, must have been a regular procedure followed by the defendant. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360 (1977). This does not mean that the defendant must have engaged uniformly in unlawful acts, *United States v. Reddoch, supra*; *United States v. Real Estate Development Corp.*, 347 F. Supp. 776, 783 (N.D. Miss. 1972), for it is clear that failures to act also may constitute violations of the Fair Housing Act. *Resident Advisory Board v. Rizzo*, 425 F. Supp. 987, 1018-1019 (E.D. Pa. 1976), *aff'd*, 564 F.2d 153 (3rd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). The existence of a discriminatory policy, statute, or ordinance is itself a discriminatory pattern or practice. *United States v. Hughes Memorial Home*, 396 F. Supp. 544, 551 (W.D. Va. 1975); *see* 106 Cong. Rec. 7223 (Senator Keating). Additionally, the failure to eliminate a policy which prevents fair housing violates the Act. *Resident Advisory Board v. Rizzo*, 425 F. Supp. at 1018.

To demonstrate that a group of persons has been denied specific rights granted by the Act the government must show that the discriminatory conduct affects more than a single individual. Even an isolated act of discrimination against a group of persons is sufficient to support relief. *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972).

The Court, after considering the evidence in its entirety, is convinced that Parma engaged in a pattern and practice of resistance to the full enjoyment of the rights

granted by Sections 804(a) and 817 of the Fair Housing Act by following a consistent policy of making housing unavailable to black persons. The Court also finds that the City's actions denied the rights secured by Sections 804(a) and 817 to groups of persons. The Court's findings are based on both a standard of racially discriminatory intent and a standard of racially discriminatory effect. *See* pp. A42-A48, *supra*. Under either standard, Parma's actions amounted to violations of provisions of the Fair Housing Act which forbid discrimination in housing on the basis of race.

The Court specifically finds that the rejection of the fair housing resolution, the consistent refusal to sign a cooperation agreement with CMHA, the adamant and long-standing opposition to any form of public or low-income housing, the denial of the building permit for Parmatown Woods, the passage of the 35-foot height restriction ordinance, the passage of the ordinance requiring voter approval for low-income housing, and the refusal to submit an adequate housing assistance plan in the Community Block Development Grant application, individually and collectively, were motivated by a racially discriminatory and exclusionary intent. The purpose of these actions, the Court finds, was to exclude blacks from residing in Parma and to maintain the segregated "character" of the City. These actions, individually and collectively, also violated the Fair Housing Act by denying to blacks, Parma residents, and prospective low-income housing developers rights secured by Sections 804(a) and 817.

This Court is well aware of the difficulty and danger of assessing and attributing motivations to actions undertaken by public officials and the electorate. And where the motive alleged is racial discrimination, which generally is exhibited in cloaked and subtle forms, the task is all

the harder. *See Palmer v. Thompson*, 403 U.S. 217 (1971). In this case, however, the evidence of racially discriminatory intent is overwhelming. Public expressions of racial bias were not limited to certain residents of the City, but were made by the highest elected public officials. Actions were taken and decisions were made which are inexplicable in the absence of racial motivations. The evidence conclusively establishes that the City of Parma took a series of actions to prevent the construction of low-income housing and thereby preclude blacks from moving into the community.

The evidence shows, for example, that in defeating the proposed fair housing resolution and in blocking every effort to build public and low-income housing, the Mayor, City Council President and members of the Council stated publicly that they were opposed to blacks moving into the City of Parma. These elected officials were opposed to any action which could change the virtually all-white composition of Parma's neighborhoods. Their public statements clearly establish that they equated public and low-income housing with housing for blacks.

With the exception of the rejection of Parmatown Woods, these particular public officials were involved in all of the actions which prevented the construction of low-income housing. Even in the case of Parmatown Woods, the Building Commissioner and City Engineer who denied the building permit were appointed by Mayor Petruska and accountable to the City's leadership. The attitudes of the Mayor, the President of City Council, and members of the Council were known to these subordinate local officials. And as the Court has noted recently, the attitudes expressed by City leaders can "infect all administration personnel . . ., and the obvious foreseeable consequence is that lower echelon decision makers would assume

that the established, albeit informal, city policy was that it was proper" to practice racial discrimination. *Arnold v. Ray*, No. C 73-478 (N.D. Ohio, decided December 11, 1979), slip op. at 4-5 (Lambros, J.).

The direct evidence of racial intent in this case is well-documented and much more substantial than that involved in previous fair housing cases in which municipalities have been found to practice a deliberate policy of racial exclusion. *Compare, e.g., Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3rd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). Combined with the circumstantial evidence adduced at trial, it is beyond cavil that Parma has held and practiced a deliberate policy of racial exclusion.

The evidence shows that Parma's virtually all-white composition was created by pervasive acts of purposeful discrimination, and was preserved by a series of discriminatory actions taken by the City. Proposals for the construction of low-income housing projects which would have had an integrative effect on the community were objected to vehemently by many of Parma's residents on racial grounds. In other significant actions, namely the rejection of Parmatown Woods and the requirement of voter approval for federally subsidized housing, abrupt departures from normal procedures insured that racial minorities would not be able to find affordable housing in Parma.

These actions on the part of the City of Parma are evidence of a segregative intent. They had a segregative effect which was not only foreseeable, but actually foreseen. Every time Parma was confronted with a choice between decisions that would have had an integrative or segregative effect, Parma chose the latter. The City of Parma consistently has made decisions which have perpetuated and reinforced its image as a city where blacks are not welcome. This is the very essence of a pattern and

practice of racial discrimination. *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 650-651 (N.D. Calif. 1973), *aff'd in relevant part*, 509 F.2d 623 (9th Cir. 1975). *See also United States v. Real Estate Development Corp.*, 347 F. Supp. 776 (N.D. Miss. 1972); *United States v. Hughes Memorial Home*, 396 F. Supp. 544 (W.D. Va. 1975). *Cf. Greene v. City of Memphis*, Nos. 78-1527, 78-1528 (6th Cir., decided November 1, 1979), *cert. granted*, ... U.S. ....., 48 U.S.L.W. 3726 (May 13, 1980) (No. 79-1176).

Parma claims that all of the actions it took were lawful because they are within the ambit of legitimately derived municipal authority. The City's basic position is that it has absolute authority to decide whether it wishes to pass a fair housing resolution, permit or encourage low-income housing within its boundaries, participate in federal housing programs, or promulgate and enforce zoning laws. According to the City "[t]he bigoted comments of a few citizens, even those with power, should not invalidate action which in fact has a legitimate basis." *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1292 (7th Cir. 1977) (*Arlington Heights II*).

The Court cannot accept the City of Parma's contention that racial discrimination can be a permissible "secondary" motivation for municipal actions if there are other legitimate bases for the actions. Such a contention is inconsistent with the great weight and wisdom of precedent which holds that a denial of housing violates Section 804(a) of the Fair Housing Act if race is even one of the motivating factors. *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1042 (2d Cir. 1979); *United States v. Pelzer Realty Co.*, 484 F.2d 438, 443 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 349-350 (7th Cir. 1970).

The Court is aware of no case in which a Fair Housing Act claim was rejected where it was established that race was a partial reason for the denial of housing. *See Robinson v. 12 Lofts Realty, Inc., supra* at 1042. Race is an impermissible factor in municipal low-income housing decisions which "cannot be brushed aside because it was neither the *sole* reason for discrimination nor the total factor of discrimination. [There is] no acceptable place in the law for partial racial discrimination." *Smith v. Sol D. Adler Realty Co., supra* at 349-350.

Parma's reliance on dicta from *Arlington Heights II* to justify its low-income housing decisions despite the blatant racial bias of some elected officials is unfounded. Neither the procedural history of the case nor the context of the court's statement supports Parma's position that racial considerations can be a motivation for municipal decisions if other legitimate and primary motivations exist.

Arlington Heights II was decided by the Court of Appeals for the Seventh Circuit after being remanded by the Supreme Court in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977) (*Arlington Heights I*). The case involved the refusal of Arlington Heights to rezone certain property to permit the construction of Section 236 low-income housing. The Supreme Court noted that the Court of Appeals, which reversed the District Court and held that discriminatory impact violated the Equal Protection Clause, had approved certain of the District Court's findings regarding discriminatory intent. Specifically, the Court of Appeals approved the finding that "the petitioners were not motivated by racial discrimination or intent to discriminate against low-income groups when they denied rezoning, but rather by a desire to protect property values and the integrity of the Village's zoning plan. 373 F. Supp., at 211." *Arlington Heights I, supra* at 259.

The Supreme Court, in reversing and remanding the case, held that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 265. Absent evidence of intent to discriminate, the Court of Appeals was limited to a consideration of the applicability and scope of the "racially discriminatory effects" standard for assessing Fair Housing Act violations. Thus, the *Arlington Heights II* court was addressing a situation in which evidence of intent, by itself, constituted an insufficient basis on which to grant relief. It was in this context that the court cautioned against the indiscriminate use of racial statements to demonstrate a violation of the Fair Housing Act.

In this case, the direct evidence of purposeful discrimination by the City of Parma against blacks is overwhelming. The situation is totally different from that in *Arlington Heights II* where "the absence of *any* such evidence . . . is a factor buttressing the Village's contention that relief should be denied." *Arlington Heights II, supra* at 1292.

Parma also erroneously relies on *Citizens Committee for Faraday Wood v. Lindsay*, 507 F.2d 1065 (2d Cir. 1974) to support its contention that the municipal decisions and actions which were taken in an atmosphere where racial considerations were present are not unlawful. *Faraday Wood* was an action seeking relief from New York City's decision not to proceed with a publicly financed housing project. The District Court, in dismissing the complaint, found that

> "on the record in this case, the plaintiffs have not established that racial motives underlay the community opposition to this project; therefore, to the extent that the inaction . . . was a response to community concerns, no racially discriminatory motives

> can be imputed to it. That there was some racial opposition does not mean that opposition on other grounds was not the overriding community sentiment or the nature of the opposition to which the administration responded."

362 F. Supp 651, 655 (S.D. N.Y. 1973). In affirming the lower court, the Court of Appeals for the Second Circuit noted that while some community opposition to the housing project was based on racial considerations, the opposition "was not for the most part racially motivated." 507 F.2d at 1070. To the extent that *Faraday Wood* might be read as suggesting that racial discrimination may be a permissible secondary motivation for muncipal action, this Court respectfully declines to embrace the reasoning of the Second Circuit.

An accurate analysis of *Faraday Wood* reveals that the court paid particular attention to evidence that the city officials who made the decision to terminate the housing project were not motivated by racial considerations. Unlike the present case, the Court in *Faraday Wood* noted that "in fact, there was evidence that those officals were not motivated by such considerations and did not believe that the community opposition to the project was primarily racial in character." 507 F.2d at 1070 (footnote omitted).[65] Any doubt concerning the correct interpretation of *Faraday Wood* on the legality of "secondary" racial motivations was recently put to rest in *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1043 (2d Cir. 1979), where the Second Cir-

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65. The degree of scrutiny which the court applied in *Citizens Committee for Faraday Wood v. Lindsay*, 507 F.2d 1065 (2nd Cir. 1974) also distinguishes that case from the present one. Because *Faraday Wood* involved the termination of a primarily middle-income project, and there was no disproportionate representation of minorities in middle-income levels, the careful scrutiny traditionally applied in typical low-income public housing was not employed. *Id.* at 1068-1069.

cuit held that race cannot play any role in a decision to deny housing in violation of Section 804(a) of the Fair Housing Act.

The City of Parma's claim that it did not violate the Fair Housing Act because it was acting within the ambit of legitimately derived authority is without factual or legal support. The record in the present case is replete with instances of community opposition to low-income housing based on racial grounds and with evidence that city officials responded to these racial considerations. Parma officials were acutely aware of race and their decisions were influenced decisively by this awareness.

The City of Parma cannot choose to make decisions on the basis of racial considerations. Actions which are typically lawful, such as a mandatory referendum on housing and zoning matters.[66] a locality's decision not to apply for federal assistance in housing,[67] and a community's refusal to promote low-income housing,[68] lose that character when

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66. *See James v. Valtierra*, 402 U.S. 137 (1971), *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976); and *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980; *reh. denied*, 397 U.S. 1059 (1970). These cases do not support Parma's contention that its ordinances, enacted pursuant to initiative referendums, do not violate the test of the Fair Housing Act. Unlike this case, the Court in *James v. Valtierra* noted that "the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority." 402 U.S. at 141. In *City of Eastlake v. Forest City Enterprises, Inc., supra*, there is no evidence that the Court was ever confronted with any evidence indicating a denial of housing because of race. Finally, in *Ranjel v. City of Lansing, supra*, the Court of Appeals for the Sixth Circuit reversed a lower court decision which had enjoined a referendum on a "spot" zoning ordinance. Not only did the Court determine that the lower court's findings of racial discrimination were clearly erroneous, but it was concerned with the injunctive relief which was granted prior to the referendum being held.

67. *See Hills v. Gautreaux*, 425 U.S. 284, 303 (1976).

68. *See Acevedo v. Nassau County*, 500 F.2d 1078, 1982 (2d Cir. 1974).

they are undertaken for a discriminatory purpose. *See Hunter v. Erickson*, 393 U.S. 385 (1969) (ordinance requiring voter referendum on racial housing matters held unlawful); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (power of citizenry to enact discriminatory laws via initiative referendum held unlawful); *Kennedy Park Homes Assn., Inc. v. City of Lackawanna*, 318 F. Supp. 669 (W.D. N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (refusal to permit construction of low-income housing in white areas held unlawful). Because the evidence clearly demonstrates that Parma's actions were motivated by racial bigotry, there is a violation of Sections 804(a) and 817 of the Fair Housing Act.

The Court finds that the City of Parma violated the Fair Housing Act not only because it made decisions with the intent to discriminate, but also because its decisions have had significant discriminatory effects. Indeed, the racially discriminatory intent and racially discriminatory effects standards dovetail because Parma's overall intent to exclude black residents has brought about the desired result. The challenged actions have had the effect, individually and collectively, of excluding blacks from the City, maintaining the segregated character of the City, preventing the construction of housing in which blacks might reside, and deterring developers from proposing and constructing integrated housing. In the opinion of the Court, these acts clearly constitute a pattern and practice of resistance to rights secured by Sections 804(a) and 817 of the Fair Housing Act.[69]

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69. Considered in isolation, no proof has been adduced that the parking ordinance, Planning and Zoning Code §1197.03, or the ordinance requiring voter approval of zoning changes, Building Code §1229.01, were enacted with a racially discriminatory purpose. However, given the entirety of the evidence, an inference

(Continued on following page)

In addition to a pattern and practice of violations of rights secured by Sections 804(a) and 817 of the Fair Housing Act, the City of Parma has prevented groups of persons from enjoying those rights. The most obvious victims have been blacks who have been prevented or deterred from obtaining housing in Parma. But the harm from the City's misguided policies has not been limited to "outsiders"; Parma residents also have been denied the right and benefit of inter-racial association guaranteed by the Act. *See Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). In addition, the Parma residents who are less-well-off and who would qualify for public or low-income housing have been denied such housing because of the City's fears that blacks would move into the City. In short, the actions of the City of Parma in consistently opposing all forms of public or low-income housing and in making construction of such housing economically infeasible, have denied to blacks, needy residents of Parma, and Parma residents generally rights granted by Section 804(a) of the Fair Housing Act.

The rights guaranteed under Section 804(a) to white residents and to black non-residents are not the only rights under the Fair Housing Act that the City has vio-

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Footnote continued—

can be made that individual actions taken during the period when this policy was in force were done to further that policy. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 362 (1977). This Court need not draw such inference. These ordinances have had a racially segregative effect. The evidence points to no legitimate interest, in theory or practice, served by the parking ordinance. In theory, there exists legitimate governmental interest behind the ordinance requiring voter approval for zoning changes. Such an interest, however, "must give way to prohibition in the Fair Housing Act that persons shall not be discriminated against on the basis of race." *United States v. Housing Authority of Chickasaw*, Civ. No. 79-0099-14 (S.D. Ala., decided March 7, 1980). p. 33.

lated. By rejecting the Parmatown Woods proposal and by enacting ordinances designed to preclude the construction of low-income housing, the City has interfered with the ability of Forest City Enterprises and other prospective developers to construct integrated housing. This interference by the City with developers attempting to provide equal housing opportunities in Parma is a violation of Section 817 of the Fair Housing Act. *See United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1975); *United States General, Inc. v. City of Joliet*, 432 F. Supp. 346 (N.D. Ill. 1977).

In the face of clear violations of the Fair Housing Act, Parma attempts to justify its actions by pointing to the absence of meaningful numbers of blacks on the west side of the Cleveland metropolitan area. The thrust of the argument is that other communities in the Cleveland metropolitan area are segregated and that it would be unfair to single out Parma alone for violations of the Fair Housing Act. This disingenuous argument has been made and rejected too many times to warrant a serious response. Parma cannot be immunized from complying with the provisions of the Fair Housing Act solely because other localities also might have violated the Act. Moreover, the western suburbs of the City of Cleveland are not parties to this case, and no evidence has been submitted to substantiate Parma's allegation that any of the communities on the west side of Cleveland have engaged in the same sort of unlawful conduct.

Regardless of whether a "racially discriminatory intent" or a "racially discriminatory effects" standard is employed, Parma has violated Sections 804(a) and 817 of the Fair Housing Act. Since the issue of remedy was pretermitted until a finding of liability, the parties are ordered to submit proposed remedies to the Court. The

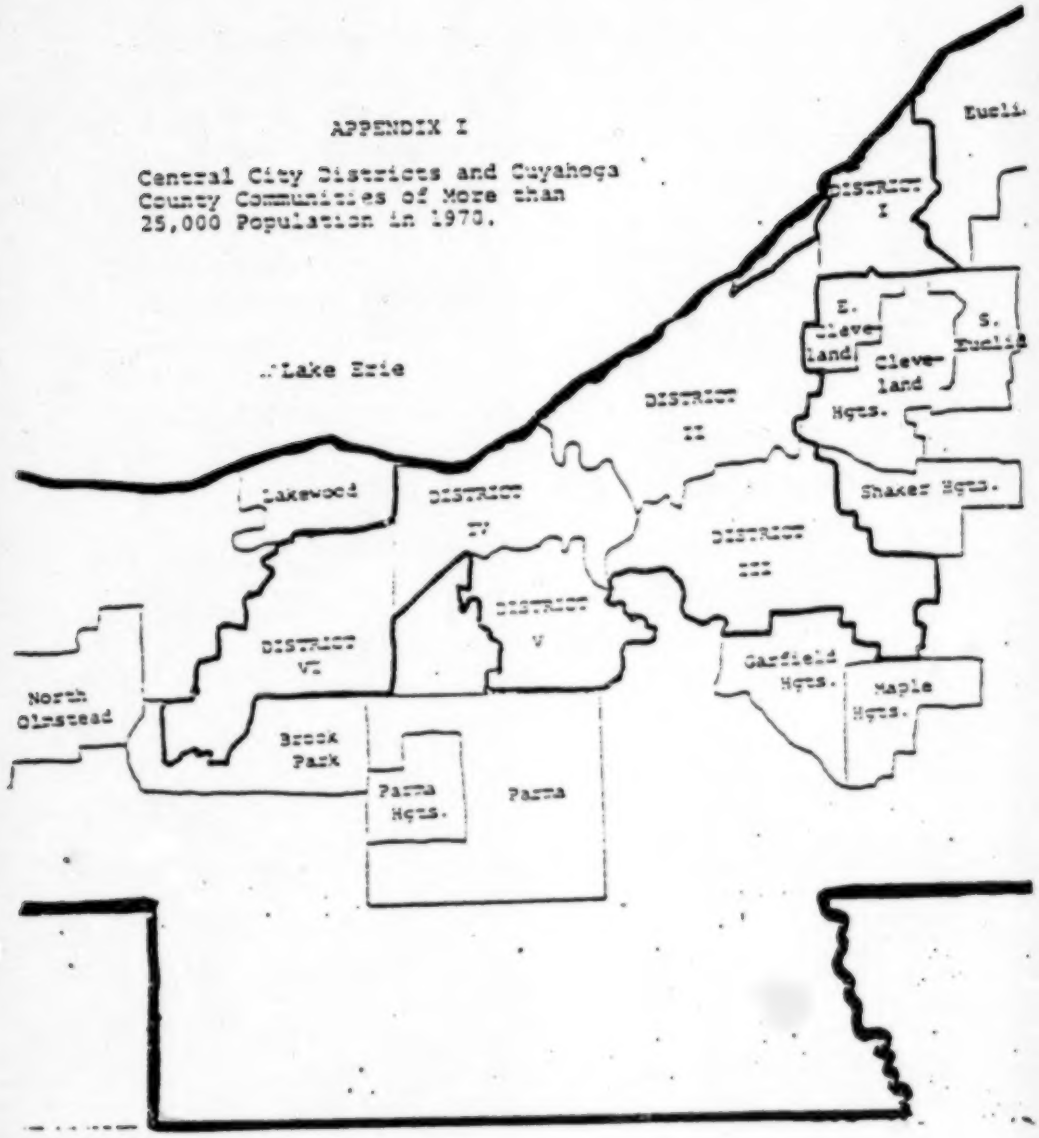
parties also are ordered to consult with one another within thirty days in an effort to reach a remedy they agree upon, which will be submitted to the Court. If no agreement is reached, the parties are ordered to file briefs on the remedy issue within sixty days of the date of this decision. The briefs should set forth the applicable law and detail the proposed remedy. Oral argument on remedy issue will be scheduled if the Court deems it necessary. The parties should bear in mind that the Court's duty is to issue a decree that will so far as possible eliminate the effects of Parma's past violation and ensure future compliance with the Fair Housing Act.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
Chief Judge

APPENDIX I

Central City Districts and Cuyahoga County Communities of More than 25,000 Population in 1970.



APPENDIX II

THE "CRILE" SITE

At trial, the government challenged Parma's actions regarding the acquisition and utilization of surplus federal land at the "Crile" site. Because the challenged conduct took place in 1968 before passage of the Fair Housing Act, it cannot constitute an independent violation of the Act. *Cf. Hazelwood School District v. United States*, 433 U.S. 299 (1977). Nevertheless, this conduct has evidentiary value with respect to the alleged post-Act violations because it sheds some light on Parma's general attitude towards housing opportunities which would have an integrative effect. *Cf., id.* at 309-310, n. 15.

In January 1968, Mayor Petruska of Parma, Mayor Paul Cassidy of Parma Heights and other officials of the two communities met with representatives of the federal government at the latters' request to discuss a proposal to convey federally-owned land located in Parma and Parma Heights to these municipalities. This land was to be conveyed under a new federal program called "New Town in Town" or "Federal Lands for Urban Community Needs." The program was designed to employ underutilized lands in the federal inventory to promote the expedited construction of racially and economically integrated housing and to provide such housing in conjunction with high-quality facilities (Tr. 499-501). A stated objective of the program was to overcome patterns of segregation that were apparent in many cities (Tr. 501). The "Crile" site was selected by a Special Task Force as one of the primary sites in the program (Tr. 508), and a team, led by Dorn C. McGrath of the Department of Housing and Urban Development, was sent to meet with officials of Parma and Parma Heights (Tr. 508).

At the meeting, Dr. McGrath explained to the two mayors that the program's objective was to provide housing for people of all income levels, including low and moderate, on an open-occupancy basis, although some industrial or commercial development of the site would also be possible (Tr. 511-513). He stressed that the goal of the program was not to place public housing in the municipalities, but to achieve both economic and racial integration (Tr. 513-518).

Mayor Petruska was opposed to the use of this land to build racially integrated housing.[70] He equated any involvement of Parma in such a program with Parma's contribution to Cuyahoga County's welfare coffers (Tr. 512-513) and said that Parma did not need housing on the "Crile" site or elsewhere (Tr. 512-513, 1329). Instead, he said that Parma needed the site for certain municipal facilities, such as an archery range and a place to put snow removal equipment in the off-season (Tr. 526). The federal officials departed concluding that any further effort to obtain the cooperation of Parma in utilizing the "Crile" site to provide integrated housing opportunities would be a futile gesture (Tr. 512; Gov. Ex. 35).

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70. In his deposition taken on January 8, 1974, Mayor Petruska categorically denied that this meeting took place or that he discussed housing with federal officials that year (Petruska dep. 226). It appears that he confused this meeting with a subsequent meeting concerning the "Crile" site held on May 21, 1968, which was unrelated to the January meeting, and which involved another proposed use for the land (Petruska dep. 226-229; Tr. 1329-1330, 1368-1369; Def. Ex. DZ). While Mayor Petruska conceded at the trial that residential use of the land was one of the subjects of the January meeting (Tr. 1327) he denied that low-income or public housing was discussed (Tr. 1328-1329). In view of the Mayor's sparse recollection of the meeting, and in view of the specified purposes of the "New Town in Town" program, the Court finds Dr. McGrath's testimony concerning the meeting credible.

Parma contends that its preconceived plans for the "Crile" site mitigate against any finding that resistance to racial integration motivated its rejection of the federal government's proposal to place an integrated "New Town" in Parma. However, the Court finds inescapable the conclusion that Parma chose the alternative that would not have an integrative effect. In this instance, the City chose recreational facilities[71] over integrated housing and was willing to sacrifice the opportunity to obtain federal land within the City if it also meant that racially integrated housing might be constructed.

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71. The site is presently being used as part of the Cuyahoga Community College complex and for a baseball diamond and other recreational facilities for Parma and Parma Heights (Tr. 1331-1332).

REMEDIAL ORDER OF DISTRICT COURT

(Filed December 4, 1980)

NO. C73-439

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs

CITY OF PARMA,
Defendant.

REMEDIAL ORDER

BATTISTI, *C.J.*

The United States of America instituted this civil rights action on April 27, 1973, alleging that the City of Parma, Ohio was engaging in practices violative of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 *et seq.*

A trial on the issue of liability in this action was held between the period of November 7, 1979 and December 14, 1979, at which twenty witnesses testified and the depositions of eleven witnesses and over 250 exhibits were admitted into evidence. The issue of remedy was pretermitted for a subsequent proceeding if liability were found.

On June 5, 1980, this Court issued a Memorandum Opinion finding the City of Parma liable for violations of Sections 804(a) and 817 of the Fair Housing Act. The

Court specifically found that the actions of Parma which were challenged by the government, namely, the rejection of a fair housing resolution, the consistent refusal to sign a cooperation agreement with the Cuyahoga Metropolitan Housing Authority, the adamant and longstanding opposition to any form of public or low-income housing, the denial of a building permit for the Parmatown Woods low-income housing development, the passage of a 35 foot residential height restriction ordinance, the passage of an ordinance requiring voter approval for low-income housing, and the refusal to submit an adequate housing assistance plan in its Community Development Block Grant application, individually and collectively, were motivated by a racially discriminatory and exclusionary intent and had foreseeable segregative effects. In sum, the Court found that Parma, the largest suburb of Cleveland, has had and continues to follow a long-standing policy and practice of excluding black persons from residing in Parma in any substantial numbers.

The Court ordered the parties in this action to consult with one another in an effort to agree upon the terms of a remedy that will so far as possible eliminate the effects of Parma's past discriminatory practices and ensure future compliance with the Fair Housing Act. On August 4, 1980, the parties met and were unable to reach agreement on the terms of a remedial order to be entered as a final judgment in this litigation. Subsequently, at the request of the United States the Court scheduled an evidentiary hearing on the remedy in this action.

On September 24-26, 1980, a hearing was held in this Court at which both parties presented witnesses and documentary testimony concerning a possible remedy for this litigation. At the conclusion of that hearing, the Court ordered the parties to submit final recommendations concerning a remedial order.

Pursuant to the Court Order requesting remedial recommendations, the government submitted a proposed remedial order, a brief in support of the proposed remedy with a study and recommendations prepared by Paul Davidoff, Executive Director of the Metropolitan Action Institute in New York who testified as an expert witness at the September hearings a proposed order appointing a Special Master and a final proposed remedial order. The City of Parma submitted a brief (1) in opposition to this Court's jurisdiction over a remedy and (2) in opposition to the government's proposed remedial order. Pursuant to recent Sixth Circuit decisions,[1] the jurisdiction of this Court is not in question. In addition, Parma submitted objections to the proposed appointment of a Special Master. Parma never submitted a remedial proposal to the Court. Not only were Parma's submissions not helpful to the Court,[2] but the briefs filed by Parma quoted inap-

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1. On September 15, 1980, the Sixth Circuit denied Parma's application for an emergency stay of the remedial proceedings in this Court, and on September 30, 1980, the Sixth Circuit dismissed Parma's appeal on the issue of liability as untimely pending the issuance of this Court's remedial orders.

2. Parma did introduce testimony at the hearings concerning the possible rehabilitation and use of the Westview Apartment Complex for low-income housing. The witness who testified on this matter, Mr. Ernest R. Kubasek, is the Chief Housing Inspector of the City of Parma.

Parma Mayor John Petruska testified that Westview and the adjoining area of Knollwood are "not up to what I would consider proper housing for the people in the way of parking facilities, safety facilities. It's a high crime area. It's probably the worst area of our community." (Tr. pp. 294-95).

Without addressing here Parma's desire to house low-income people in a high crime area, the worst area of their community, the Court does not consider this proposal to be particularly helpful (1) because of its limited scope in terms of the liabilities found and (2) because no one empowered to effect the rehabilitation and conversion to low income use was presented at trial. In the comprehensive remedy which is required in this case, the potential desirability and feasibility of the use of any particular property is better left to the Fair Housing Committee, discussed below.

posite cases and employed racially incendiary language. Such a use of documents within the public record could be expected to, and in fact did, reach the press.[3] The Court has admonished the defendant's present lawyers, both in chambers and from the bench, not to traumatize and incite those who may be affected by the delicate and necessary steps that the Court must take to remediate the statutory violations which were found in Parma.

The Court has reviewed the recommendations and remedy submissions of the parties and the record of the remedy proceeding held herein. Based on this review, the Court has formulated a comprehensive remedial plan to be implemented in this action.

I.

As in any equity proceeding, the scope of the remedy is determined by the nature and the scope of the legal violation. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). Accordingly, the remedy in this case must address this Court's overall findings that Parma has had a long-standing policy of deliberate racial exclusion, in addition to addressing the specific unlawful actions which Parma took in furtherance of this exclusionary design.

Section 813 of the Fair Housing Act, 42 U.S.C. §3613, pursuant to which the United States brought this lawsuit, provides in pertinent part that, in cases of this kind, the Attorney General may request "such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible" for the violation of the rights guaranteed by the Act. This section requires the

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3. *See*, for example, *The Plain Dealer*, Thursday, October 16, 1980, at p. 4-B, quoting Parma's brief filed October 14, 1980.

Court to exercise its powers to fashion affirmative equitable relief designed to eliminate, to the extent possible, the discriminatory effects of Parma's actions. See *Park View Heights v. City of Black Jack*, 605 F.2d 1033 (8th Cir. 1979). Courts should not be grudging with respect to the entry and scope of injunctive relief under a statute where Congress expressly authorized it. *Hodgson v. First Federal Savings and Loan Association of Broward County, Florida*, 455 F.2d 818 (5th Cir. 1971) (age discrimination in employment); *United States v. Hayes International Corp.*, 415 F.2d 1038 (5th Cir. 1969) (employment).

This Court has already recognized its duty to grant relief in this action which will so far as possible eliminate the discriminatory effects of Parma's past actions and ensure Parma's future compliance with the Fair Housing Act. *Louisiana v. United States*, 380 U.S. 145, 154 (1965); *Park View Heights v. City of Black Jack, supra*; *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221, 228 (5th Cir. 1971). In determining appropriate equitable relief to eliminate such discriminatory effects, courts must be guided by the provisions and purposes of the Fair Housing Act. *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 616 F.2d 1006 (7th Cir. 1980), at 1011; *Park View Heights v. City of Black Jack, supra*, at 1036; Cf. *Teamsters v. United States*, 431 U.S. 324, 364 (Title VII); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (Title VII).

The purpose of the Fair Housing Act is to provide, within constitutional limitations, for fair housing throughout the United States, 42 U.S.C. §3601. The primary objective of Title VIII is, in the words of then Senator Mondale, to replace "the ghetto[s] . . . by truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (1968). This objective is one to which Congress has ac-

corded the highest priority, *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972); *Park View Heights v. City of Black Jack, supra.* The Act is to be construed generously so as to ensure the prompt and effective elimination of all traces of discrimination within the housing field. *Trafficante, supra,* at 211-212. *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91 (1979); *Marr v. Rife,* 503 F.2d 735, 740 (6th Cir. 1974).

At the same time, however, this Court should not order relief that is more intrusive on the governmental functions of Parma than is necessary to achieve Title VIII's goals. *Park View Heights v. City of Black Jack, supra* at 1040; *Resident Advisory Board v. Rizzo,* 564 F.2d 126, 149 (3rd Cir. 1977); *cert. denied,* 435 U.S. 908 (1978).

For civil rights violations such as those in existence herein, courts are governed by traditional principles of equity in fashioning affirmative relief. *Milliken v. Bradley,* 433 U.S. 267, 279-80 (1976); *Teamsters v. United States,* 431 U.S. 324, 374-375 (1976); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 12-13 (1970). As Chief Justice Burger stated in *Lemon v. Kurtzman,* 411 U.S. 192, 200 (1972):

> (E)quitable remedies are a special blend of what is necessary, what is fair, and what is workable. 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.' *Brown v. Board of Education,* 349 U.S. 294, 300 (1955).

With these principles in mind, many courts have addressed findings of liability against municipalities for violations of the Fair Housing Act and have authorized broad remedies aimed at effectively curing these violations. *United States v. City of Black Jack,* 508 F.2d 1179 (8th

Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Kennedy Park Homes Assn. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 616 F.2d 1006 (7th Cir. 1980). *See Garrett v. City of Hamtramck*, 503 F.2d 1236 (6th Cir. 1974); *Parkview Heights v. City of Black Jack, supra.*

In fashioning the relief granted herein, this Court has also been guided by the above-stated principles. The remedial plan set forth below is fair, is workable and is, above all, necessary. However, the Court is mindful that only with the strong and sincere efforts of Parma in carrying out the terms of this Order will Parma become an open community. This Remedial Order will provide freedom and flexibility to Parma to shape, within certain guidelines, its own means for achieving and maintaining equal housing opportunity and to demonstrate its support for the affirmative fair housing policies and programs contained therein. However, the Court will supervise closely the actions taken by Parma to redress its past discriminatory activities and the resulting injury to blacks and other persons in the Cleveland metropolitan area.

II.

REMEDY

A. *General Non-Discrimination Provisions*

This Court has found that Parma, with racially discriminatory intent and effect, has violated Sections 804(a) and 817 of the Fair Housing Act. Parma must, therefore, be enjoined permanently from further action which would violate the Act. In civil rights cases such as this, once a finding of liability has been made, such injunctions are routinely granted. *United States v. West Peachtree Tenth*

Corp., 437 F.2d 221 (5th Cir. 1971) *reh. denied*, 437 F.2d 231 (5th Cir. 1971); *United States v. Warwick Mobile Homes, Inc.*, 537 F.2d 1148 (4th Cir. 1976).

Accordingly, it is hereby ORDERED that the defendant City of Parma, its officers, directors, agents, servants, employees, successors and all persons in active concert or participation with any of them, are hereby permanently enjoined from:

1. Engaging in any conduct having the purpose or effect of perpetuating or promoting racial residential segregation or of denying or abridging the right of any person to equal housing opportunity on account of race, color, religion, sex or national origin;

2. Discriminating against any person or group of persons on account of race, color, religion, sex or national origin in connection with the planning, development, construction, acquisition, financing, operation or approval of any low-income or public housing units;

3. Interfering with any person in the exercise of his right to secure equal housing opportunity for himself or for others; and

4. Taking any action which in any way denies or makes unavailable housing to persons on the basis of race, color, religion, sex or national origin.

B. *Educational Program*

This Court has found that Parma, through its City officials, has violated the Fair Housing Act. In order that all Parma officials and employees understand and carry out their responsibilities under the Fair Housing Act and the terms of this Order, Parma should develop and implement a fair housing educational program for those per-

sons. *See United States v. West Peachtree Tenth Corp., supra.* This program should be open to any other interested persons or groups and may be designed with the assistance of a fair housing group experienced in such an endeavor. It would serve to dispel the notion, on the part of City employees, that Parma City leaders are fostering racially discriminatory policies. *See Arnold v. Ray,* No. C73-478 (N.D. Ohio, decided December 11, 1979), slip op. at 4-5 (Lambros, J.).

Therefore, it is ORDERED that a fair housing educational program shall be developed and implemented for all Parma officials and employees responsible for carrying out the terms of this Order. The purpose of this program shall be to inform such persons of Parma's nondiscriminatory housing policy and of their obligations under the terms of this Order and the Fair Housing Act. In addition, the program shall consist of instruction concerning components of an affirmative action plan designed to inform black and other minority persons that they are welcome to reside in Parma. Attendance at this program shall be mandatory for the officials and employees involved.

C. *Fair Housing Resolution*

This Court has found that Parma's refusal to enact a fair housing resolution was racially motivated and had a segregative effect. To remedy this violation, and to ameliorate Parma's reputation as a racially exclusionary community, Parma is ORDERED to enact a fair housing resolution welcoming persons of all races, creeds and colors to reside in Parma and setting forth Parma's policy of nondiscrimination in all aspects of housing in the City.[4]

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4. The specific wording of such a resolution should, of course, be left for Parma to formulate. In this regard, the Court

(Continued on following page)

D. *Advertisement of Parma As An Open Community*

This Court has found that Parma has perpetuated a racially exclusionary and discriminatory image. In order to eliminate the perception of Parma in the Cleveland area, and in the minority community of Cleveland in particular, as a closed municipality, Parma must implement an advertising program promoting Parma as an equal housing opportunity community. The purposes of this program are clear: to inform the region that (1) Parma is seeking to become an open community; (2) Parma is attempting to expand housing choice for minorities in the City; (3) all persons are welcome in Parma; and (4) discriminatory practices which have characterized Parma in the past no longer reflect the attitude of the City and its citizens.

Accordingly, it is further ORDERED that Parma shall undertake a comprehensive advertising program in newspapers which circulate principally in the black community in the region, as well as in the major regional newspapers. This advertising campaign shall be directed at accomplishing the above-stated purposes in addition to promoting Parma as a good place for persons of all races to reside.

Footnote continued—

takes notice of the testimony of Paul Davidoff, the government's expert witness at the remedy proceeding, who testified concerning further action which Parma could take in connection with the fair housing resolution.

Specifically, Mr. Davidoff recommended that Parma enact a fair housing ordinance and develop a statement of criteria for judging its own progress in working constantly to expand housing opportunity. (Tr. p. 38) This Court believes firmly that the cause of equal housing opportunity in Parma would be greatly served by the establishment in Parma, in conjunction with the passage of a fair housing resolution, of a fair housing enforcement mechanism to handle housing discrimination complaints in the City. Such a mechanism, which may be eligible for federal funding, would reduce reliance on federal enforcement of fair housing and strengthen local commitment to open occupancy. The Court suggests that Parma gives serious consideration to such a procedure.

It is further ORDERED that Parma print, duplicate or otherwise make two hundred (200) clear and legible copies of this Remedial Order and one hundred (100) clear and legible copies of this Court's Memorandum Opinion of June 4, 1980, immediately. The Remedial Order and Memorandum Opinion shall be made freely available to anyone, upon request, at Parma's City Hall. It shall be within the discretion of the Special Master to require Parma to produce additional copies of these materials as he deems it necessary. Parma shall give notice within its advertising campaign that these materials are available, free of charge, at Parma's City Hall.

E. *Parma's Ordinances*

This Court's June 5, 1980, decision in this action found certain of the Codified Ordinances of Parma to be violative of the Fair Housing Act. Specifically, the Height Limitation Ordinance (§1529.37) and the Low Income Housing Ordinance (§1528) were found to be discriminatorily motivated and to have a racially discriminatory effect, and the Parking Ordinance (§1197.03) and the Zoning Referendum Ordinance (§1229.01) were found to have a racially segregative effect with no sufficient countervailing legitimate interests behind their passage.

As stated above, this Court has broad equitable powers to remedy violations of the Fair Housing Act and, where ordinances such as the ones at issue have been found to thwart equal housing opportunity, such ordinances must give way to the dictates of federal policy. *See, e.g., United States v. City of Black Jack, supra; Metropolitan Housing Development Corp. v. Village of Arlington Heights, supra.* However, this Court must also be mindful of its duty to limit intrusion into Parma's affairs to the extent consistent with equal housing opportunity, *Park View Heights v. City*

of Black Jack, supra; Resident Advisory Board v. Rizzo, supra, and should not interfere with the enforcement of Parma's ordinances except where their implementation would have a racially segregative purpose or effect.[5]

Parma's Low Income Housing Ordinance can affect only proposed low-income housing in Parma and, as this Court has noted in its June 5, 1980, opinion in this action, its presence in Parma's Codified Ordinances serves as a deterrent to the development of low-income housing. The continued existence of this discriminatorily-motivated ordinance in a virtually all-white city like Parma can only help to maintain segregation while serving no other legitimate interest of Parma. Accordingly, it is hereby ORDERED that Parma's Low Income Housing Authority be of no further force and effect in that City.

The Height Limitation Ordinance, the Parking Ordinance and the Zoning Referendum Ordinance are not limited to low or moderate income housing. It is ORDERED that those ordinances may remain in full force and effect subject to the following exceptions:

(1) the Height Limitation Ordinance shall not apply to any low or moderate income housing proposal submitted to the City;

(2) the Parking Ordinance shall not apply to any low or moderate income housing proposal submitted to the City, except that the City may impose a parking requirement, reasonable in light of the purposes and goals of this Order, on any such submission, subject to the approval of the Fair Housing Committee established pursuant to this Order;

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5. Thus, Section 815 of the Fair Housing Act provides that "Any law of a State, a political subdivision, or other jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this title shall to that extent be invalid." 42 U.S.S. 3615.

(3) the Zoning Referendum Ordinance shall not apply to any proposed change in land use where any low or moderate income housing project is proposed of such land.[6]

F. *Bringing Low Income Housing to Parma*

This Court has found that Parma's adamant and long-standing opposition to any form of public or low-income housing was motivated by a racially discriminatory intent and had a racially discriminatory effect. To remedy the continuing effects of this conduct, Parma must be required to take actions aimed at increasing the supply of low-income housing for the purpose of increasing housing opportunities for low-income blacks and other minorities in the City.[7] There are several actions which, collectively, can accomplish this.

1. *Fair Housing Committee*

Parma is hereby ORDERED to establish a Fair Housing Committee within its City government. The purposes of this Committee are to operate as the primary governmental agency in Parma responsible for developing a remedial plan consistent with this Order, to ensure that

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6. Conditions 1-3, *supra*, are consistent with this Court's duty to avoid unreasonable intrusion into Parma's affairs while at the same time safeguarding the rights of those protected by the Fair Housing Act. It is a reasonable provision, as testified to by Parma's expert witness, Harry Henshaw. (Tr. 364, 369) This provision does not imply that, with regard to the Parking and Zoning Referendum ordinances, Parma should not be allowed to impose reasonable parking and zoning requirements on residential development in the City. Where allegedly reasonable requirements clash with the development of low or moderate income housing, Parma's Fair Housing Committee (*see infra*) should decide on the reasonableness of such requirements in light of the purposes and goals of this Order.

7. By low and moderate income housing is meant housing which is affordable by those households earning 80% or less of the median income for the Cleveland metropolitan area.

the provisions of this Order are fully complied with and that fair and open housing practices become a reality there. The specific functions of this Committee shall be as follows:

(a) Developing the advertising and educational programs referred to above;

(b) Drafting a fair housing resolution;[8]

(c) Developing an outreach program aimed at (i) enlisting the support of the real estate and development community in the region for the cause of making Parma a truly open community and (ii) establishing ties with regional fair housing and minority groups in order that their efforts may also be directed at making fair housing a reality in Parma;

(d) Establishing within the City government a Housing Information and Referral Service which would among other things assist persons wishing to move into Parma by providing information concerning housing opportunities and available facilities, providing housing counseling services, and acting as a referral agency to various social service facilities and agencies;

(e) Developing a program designed to foster an interest among housing developers in bringing low-income housing to Parma. This program shall include advertising for proposals for low and moderate income housing when federal funds for such housing have been made available, conducting educational meetings for developers concerning low-income housing programs and Parma's interest in having such housing in the

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8. In addition, if the Committee heeds this Court's suggestion, formulating a fair housing enforcement program for the City.

City, and developing a series of developer incentives aimed at making the development of low-income housing in Parma attractive;[9] and

(f) Conducting a survey of vacant land in Parma (City-owned or otherwise) suitable for low-income housing development. Such a survey would assist in the development of a Housing Assistance Plan for Parma in connection with an application for Community Development Block Grant funds (*see infra*).[10]

Membership on the Fair Housing Committee shall consist of Parma citizens who are collectively knowledgeable in the fields of fair housing, real estate, housing development, planning and federal housing programs and other citizens who are sincerely interested in working to promote the purposes of this Order. Within 30 days of the entry of this Order, Parma shall submit to the Court for its approval the names of the persons who will serve on the Fair Housing Committee. The United States shall then have 30 days to respond to Parma's recommendations.

During the course of the Fair Housing Committee's formulation of the detailed components of the remedial plan in this action, it shall meet on a regular basis with an Evaluation Committee composed of representatives of fair housing, minority, religious and business groups in the region. This Evaluation Committee shall review the work of the Fair Housing Committee and, where appropriate, make recommendations to the Court, or its representative.

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9. Such incentives could include, among other things, density bonuses, promise of reasonable variances, cost write-downs on City-owned land and easing of the bureaucratic process.

10. The Committee may also consider proposing that Parma should not conduct City business with any real estate or development concern which has not signed an assurance of nondiscrimination in the conduct of its business.

Within 30 days of the entry of this Order, the parties shall each submit to the Special Master recommendations concerning membership on the Evaluation Committee. The Court shall appoint the members of the Evaluation Committee. Neither committee shall have fewer than 7 nor more than 15 members.

All decisions of the Fair Housing Committee shall be reviewed within 10 days first by the Evaluation Committee and then by the Special Master for approval. In the event that either Committee is dissatisfied with the decision which is reached by the Special Master, that Committee may appeal directly to the Court for review.

2. *Public Housing*

In addition to finding discriminatorily motivated opposition by Parma to any type of low-income housing, this Court found that Parma refused to sign a cooperation agreement with CMHA for racial reasons.

Accordingly, Parma is hereby ORDERED to take whatever action is necessary in order to allow the construction of public housing in the City. This shall be done in one of two ways:

(a) Parma shall sign a Cooperation Agreement with CMHA; or

(b) Parma shall establish its own Housing Authority and proceed to develop a public housing program in the City.[11]

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11. To the extent permitted by Ohio law. Nothing in this paragraph is intended to preclude Parma from exploring other nondiscriminatory public housing options which may involve different construction/management methods than are normally utilized.

If method (b) is chosen, Parma's Housing Authority shall not impose a City residency requirement on public housing occupancy and shall, unless impossible, fill at least 20% of its public housing vacancies from the applicants on the CMHA public housing waiting list. With regard to the selection of applicants from the CMHA list, the Parma Housing Authority shall follow the same priority established by CMHA.

3. *Section 8 Housing*

Parma is hereby ORDERED to develop a program in the City aimed at the interjurisdictional use of the Section 8 existing housing program. This shall be done in one of two ways:

(a) Parma shall develop a cooperative relationship with CMHA, the current administrator of the Section 8 existing program in Cuyahoga County; or

(b) Parma shall designate or establish a Public Housing Agency within its government for the purpose of applying for funds to implement a Section 8 existing housing program and carrying out that program.[12] In the event that Parma chooses this option, no Parma residency requirement may be imposed, and Parma may not impede in any way the ability of those persons holding Section 8 certificates issued through CMHA to find housing in Parma. Because of the many intricacies of the Section 8 existing program, Parma might consider seeking the cooperation of a fair housing group within or without the Cuyahoga County area, knowledgeable in the working of Section 8, in the development of its own interjurisdictional program.

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12. To the extent permitted by Ohio law.

4. *Community Development Block Grant Funds*

This Court has found that Parma's refusal to submit an adequate CDBG application in 1975 was racially motivated and had a discriminatory effect. The receipt of CDBG funds would have helped the City of Parma to provide an equal opportunity in housing for all races. This opportunity has not been lost. As credible evidence presented by the government in the remedy proceeding indicates, CDBG funds can help cover expenses related to the remedy ordered herein. In addition to facilitating equal housing opportunities, CDBG allocations can provide a major funding source for other municipal projects in Parma which, by its own claim, is financially distressed.

As an entitlement community under the CDBG program, Parma has reserved for its use, to increase low and moderate income housing opportunities and make other needed improvements in Parma, nearly one million dollars each year in federal funds. Because Parma has claimed to this Court that it is in serious financial difficulty, and in consideration of the Court's previous findings of liability based in part upon Parma's motives for refusing to participate in the CDBG program, a court ordered remedy imposing a requirement that Parma apply for its allocated CDBG funds is appropriate.

Accordingly, it is hereby ORDERED that Parma shall take all steps necessary for the submission of a Community Development Block Grant application acceptable to HUD which will enable Parma to avail itself of these federal funds which are of utmost importance to the implementation of the provisions of this Order.

5. *New Development of Low-Income Housing*

There are no federally-subsidized low-income housing projects in Parma. That this has occurred is not fortuitous,

as Parma has adamantly opposed any form of low-income housing because of the fear that it might attract blacks to the City. In light of this, Parma is ORDERED to develop plans for low or moderate income residential development, over a period of several years, of land (City-owned or otherwise) suitable for the development of such housing.[13] Plans must be made for either entirely low and moderate income housing development or mixed income housing development on these sites. After these plans are formulated, Parma must then make all efforts possible to assure that this new housing is constructed.

At the remedy proceeding in this action, the United States presented the testimony of an economist from the Columbus, Ohio Area Office of HUD, who testified concerning Parma's low-income housing needs and the methodology routinely employed by HUD to calculate these needs and the low-income housing needs of municipalities throughout Ohio and the nation. The Court finds this testimony credible and accepts HUD's determination that Parma's low-income housing needs currently approximate 2669 households. (Tr. 272) Given this need, Parma is ORDERED to make all efforts necessary to ensure that at least 133 units of low and moderate income housing are provided annually in Parma.[14] This number is a threshold beyond which Parma must strive to go in provid-

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13. To the extent that land is suitable for such development with the exception of the land's zoning classification, and the Fair Housing Committee determines that a change in that zoning to a classification which would allow low or moderate income housing development would be reasonable, the existing classification shall be changed to a classification enabling construction of low or moderate income housing.

14. This number is derived from Parma's total need of 2669 households. Had Parma applied for CDBG funds and submitted a housing Assistance Plan to HUD setting forth this need, HUD would expect Parma to attempt to meet, by way of new construction, 15% of its needs over a 3 year period. This breaks down to approximately 5% per year, which is 133 units. (Tr. 285-86)

ing new housing opportunities in the City. This is so because, in addition to addressing its current needs, Parma must address those low-income housing needs which have been in existence since at least 1968 but which have been ignored by Parma for racial reasons. This Court can require no less in carrying out its obligations in this action.

While the ultimate burden of producing low or moderate income housing in Parma may indeed lie with the housing development community, Parma must facilitate in every way the construction of this housing and speed up the progress of any such proposals through Parma's bureaucratic mechanisms. With this type of cooperation between Parma and the development industry, new low or moderate income housing will become a reality in this City.

III.

SPECIAL MASTER

Parma has raised objections to the appointment of a Special Master under Federal Rule of Civil Procedure 53(b) and the Supreme Court decision in *LaBuy v. Howes Leather Company*, 352 U.S. 249 (1957), which the Court will address.[15] Federal Rule of Civil Procedure 53 does not delineate the parameters of a court's authority. By reciting some of the functions of a Special Master, Rule 53 does not preclude others[16] so long as the Court does

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15. The Court has considered the balance of Parma's objections and finds them to be without merit.

16. In a thoughtful study of the use of Special Masters written under a contract with the Federal Judicial Center, Vincent M. Nathan, Professor of Law at the University of Toledo, distinguished the pre-decretal master from the post-decretal. "While the propriety of the appointment of a master prior to the issuance of a remedial decree should be measured by [the Rule 53] test, the same is not true of a post-decretal appointment under

(Continued on following page)

not abdicate its decision-making responsibility. Liability against Parma has been established. *La Buy v. Howes Leather Company, supra,* is manifestly inapposite.

As Parma has indicated, "[t]here is no . . . body of law promulgated by the Supreme Court in actions under the 'Fair Housing Act' as there has been in [school desegregation cases]." (Defendant City of Parma's Objections to Proposed Appointment of "Special Master," filed October 14, 1980, p. 1)[17] However, the magnitude of Parma's liability has necessitated a remedy which addresses the numerous illegal actions by the Defendant City. The magnitude of the wrong has dictated the magnitude of the remedy, which is, necessarily, broader than remedies in prior housing cases which involved a single discriminatory ordinance and/or the development of a single low-income housing project. See *Kennedy Park Homes Ass'n v. City of Lackawana, N.Y.*, 436 F.2d 108 (2nd Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971); (development of a low-income housing project on a certain location in the city);

Footnote continued—

which a master's tasks will relate to monitoring and possibly to implementation of the court's order." (footnote omitted) Nathan, Vincent M., "The Use of Masters in Institutional Reform Litigation," *A Report to the Federal Judicial Center,* reprinted from the Toledo Law Review, Vol. 10, Winter 1979, at 432.

> The propriety of a post-decretal appointment, however, should rest in the sound discretion of the trial court, and its decision to make such an appointment should be subjected only to an "abuse of discretion" standard on appeal. So long as the remedial phase of the litigation is sufficiently complex and comprehensive to suggest that the court's reliance upon the parties themselves is not calculated to produce ascertainable compliance in relatively short order, the court's decision to refer the matter to a master should not be disturbed. *Id.* at 432-33.

17. This Court sees no reason to wait five years before determining that a Special Master is needed in order to adhere to the limited precedent available in fair housing cases. *See Chicago Housing Authority v. Austin,* 511 F.2d 82 (7th Cir. 1975); *Gautreaux v. Chicago Housing Authority,* 384 F.Supp. 37 (N.D. Ill. 1974).

Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006 (7th Cir. 1980) (development of a low-income housing project, new site agreed upon in consent decree); *Park View Heights v. City of Black Jack*, 605 F.2d 1033 (8th Cir. 1979) (discriminatory zoning ordinance led to the demise of a racially integrated town house development); *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3rd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); (failure of the defendants to permit the construction of planned low-income housing project).

The provisions set out at II above form a comprehensive framework within which a plan can be developed to remedy the violations for which Parma has been found liable. Because of the broad scope of the legal violations in this action, the remedy is of necessity also broad. However, no matter how broad and complicated the resolution to this litigation may be, it is essential that it go forward in an orderly fashion. To see that this occurs, and that the provisions of this Order are ultimately carried out, the Court is of the opinion that the appointment of a Special Master is clearly necessary.

One of a myriad of examples which illustrate the need for a Special Master in public law litigation of this kind should suffice: the Court would be required to meet with, preside over and enter into dialog with all the various political and Court-ordered entities in the political forums which this remedy requires. In public law litigation, these tasks are more appropriately delegated to a Special Master. The Court has given careful consideration to the appointment of a Magistrate as Special Master in this case. However, a Magistrate suffers from the same disabilities as does the Court; therefore, the Court finds that a Magistrate would be inappropriate as a Special Master here.

The powers and functions of the Special Master shall be as follows:

1. The Special Master shall oversee the formulation, by the Fair Housing and Evaluation Committees, of the remedial procedures to carry out the provisions of this Order. He shall evaluate the sufficiency as well as the practicability of these procedures in light of the purposes which they are intended to serve;

2. The Special Master shall be available, during the formulation process, on a regular basis, to give advice to and to serve as an arbitrator of possible disputes between the parties and/or Committees. All questions which the parties and/or Committees may have concerning this Order and their duties thereunder shall be directed first to the Special Master. Questions which cannot be resolved by the Special Master may be addressed directly to the Court;

3. The Special Master shall prepare and submit to the Court recommendations concerning the remedial plan prepared pursuant to this Order, together with any revisions or alternative plans which he deems necessary to carry out the Court's mandate in this action;

4. The Special Master may conduct such hearings and investigations as he deems necessary to the performance of his duties;

5. The Special Master may utilize the services, when necessary, of experts in various fields in performing his duties under this Order. The Special Master and such experts shall have complete and unrestricted access to the records of defendant City of Parma. They shall have free access to all Parma employees and staff. They shall be given notice of and free access to all meetings, public or private, at which this Order and the remedial plan to be formulated hereunder are to be discussed. The Special Master shall determine the time and place of all meetings except those regularly scheduled governmental meet-

ings whose time and place have been established by State law, local ordinance, or long-standing custom or tradition. Meetings set by the Special Master shall have precedence over all other business of the City. The Special Master shall preside over those parts of every meeting he attends which are, in his judgment, related to these Remedial Orders. The Special Master may bring official reporters to record and then to transcribe the minutes of said meetings, executive or otherwise. Records of executive sessions shall be held in confidence by the Special Master, his advisers, and the reporters, unless otherwise ordered by the Court. It is the intention of the Court that the Special Master's access to private meetings shall be interpreted broadly to include, for example, executive sessions and councilmanic caucuses;

6. With the consent of the attorneys for both parties, the Special Master may, as the need arises, contact and confer with the attorneys for the respective parties. If counsel for one party does not so consent, the Special Master may order a meeting with both parties;

7. The Special Master shall oversee the implementation of the ultimate remedial plan for this litigation and report to the Court, on a regular basis, concerning Parma's progress under this Order. Such report may contain recommendations, if necessary, concerning action to be taken by Parma to improve compliance with the remedial plan.

The Special Master shall be compensated at a fair and reasonable rate commensurate with his or her abilities and duties. The rate of compensation shall be set by the Court. Parma is responsible for the compensation of the Special Master.

Having considered the appointment of a Special Master in light of the functions which that person must perform, the Court hereby appoints Joseph W. Bartunek as Special Master in this case.

IV.

CONCLUSION

The ultimate responsibility for the success of the remedial plan in this litigation lies with the City of Parma. The procedures and mechanisms put in place in response to this Order are designed to work, and work well, toward providing equal housing opportunity, but only with the good faith cooperation of Parma can that goal be achieved. The Court reminds those who are to carry out the policies implicit in these Orders that the right of all people to open housing was drawn from the Constitution and incorporated into the laws of the United States through the efforts of the Congress and the Executive for implementation by the United States Courts, pursuant to their powers under Article III of the Constitution. Thus the defendant City of Parma must dedicate itself to carrying out the spirit as well as the letter of this remedy. Only with such dedication to the principles of the fair housing policies as promulgated by the United States Congress will Parma become, and be viewed as, a truly open community.

This Court retains jurisdiction of this action for all purposes.

/s/ FRANK J. BATTISTI
Chief Judge

MEMORANDUM OPINION AND ORDER OF DISTRICT COURT IN COMPANION, CONSOLIDATED CASE

(Filed February 22, 1974)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JACQUELINE CORNELIUS, *Et Al.*,
Plaintiff,
v.
CITY OF PARMA, *Et Al.*,
Defendant.
} No. C 73-437

UNITED STATES OF AMERICA,
Plaintiff,
v.
CITY OF PARMA, OHIO,
Defendant.
} No. C 73-439

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

These are consolidated cases challenging housing practices pursued by the City of Parma, Ohio.

C 73-439 (hereinafter referred to as the Government's suit) was instituted by the Attorney General, on behalf of the United States, pursuant to Section 813 of the Fair Housing Act of 1968, 42 USC §3613 and 28 USC §1345.

The Government alleges that it has been the policy of Parma to exclude black persons from residing within its limits in any significant numbers, and that the City in accordance with this policy has engaged in acts and practices which effectively operate to deny equal housing opportunity to blacks on account of race. More specifically, the Government charges that Parma in the fall of 1971 refused to issue a building permit to allow the construction of a federally assisted apartment development by Forest City Enterprises, an Ohio corporation, for the reason that the development would have provided opportunity for a substantial degree of desegregated occupancy within the boundaries of the City. Additionally, the Government challenges ordinances enacted by initiative vote of the Parma electorate at about the same time as the apartment development was blocked by Parma officials.

One of these ordinances generally limits the height of residential buildings to be constructed in Parma to thirty-five feet. The other provides that "no low-rent housing project shall be developed, constructed or acquired in any manner in the City by any public body or authority, nor shall approval be granted for participtation in the Federal Rent Supplement Program, until a majority of the qualified electors of the City voting upon such issue approve such project or such participation by voting in favor thereof at an election to be held for that purpose or at the next primary or general election."[1]

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1. The two ordinances have been incorporated in Parma's municipal building code. The height limitations ordinance is contained in Section 1529.37 of the code. It provides:

"MAXIMUM HEIGHT OF RESIDENTIAL STRUCTURES.

No building designed for and occupied in whole or in part as a residence, including, but not limited to, single-family houses, dwelling houses, multiple dwellings, lodging houses, apartment houses, hotels and condominiums, shall exceed thirty-five feet in height. (Initiative. Passed 11-2-71.)"

(Continued on following page)

It is contended that these ordinances, although facially neutral, were enacted for the purpose of preventing the construction in Parma of racially integrated housing for persons of low and moderate income and, in the context of Parma's longstanding posture toward such housing, have had such an effect.

Parma's conduct, it is alleged, constitutes a pattern and practice of resistance to the full enjoyment of rights secured by Title VIII of the Fair Housing Act of 1968, 42 USC §3601 *et seq.*, and by the Thirteenth and Fourteenth Amendments to the United States Constitution, as well as a denial of rights to equal opportunity in housing, raising

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Footnote continued—

The referendum requirement ordinance is contained in Chapter 1528 of the code. Its full text is as follows:

"1528.01 DEFINITIONS

For the purpose of this chapter:

(a) 'Low rent housing project' means:

(1) Any development composed of one or more dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a State public body or authority or to which the Federal Government or a State public body or authority extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise, or

(2) Any development composed of one or more dwellings, apartments or other living accommodations for persons of low income, developed, constructed or acquired by a private individual or a nonpublic body, and to which the Federal Government will make rent supplement payments on behalf of low income families or individuals eligible for public housing.

(b) 'Persons of low income' and 'low income families' means persons or families who lack the amount of income which is necessary to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding, as determined by the public body or authority developing, constructing or acquiring the housing project or by the administrator of the Federal Rent Supplement Program pursuant to Federal or State laws, rules or regulations.

(Continued on following page)

an issue of general public importance. This conduct has allegedly worked to:

(a) perpetuate the present all-white character of the City;

(2) deny dwellings to prospective black residents of the excluded housing on account of race;

(c) deny dwellings to prospective white residents of such housing on account of the race of their black prospective fellow-residents; and

(d) interfere with the right of actual and prospective sponsors of federally assisted housing to assist persons in exercising their right to equal housing opportunity.

Footnote continued—

'Federal Rent Supplement Program' means any plan, program, law, rule or regulation of the Federal Government under which the Federal Government pays to private individuals or nonpublic bodies owning a low rent housing project, all or any part of the rent of low income families or individuals eligible for public housing. (Initiative. Passed 11-2-71.)

1528.02 APPROVAL BY ELECTORS.

No low rent housing project shall be developed, constructed or acquired in any manner in the City by any public body or authority, nor shall approval be granted for participation in the Federal Rent Supplement Program, until a majority of the qualified electors of the City voting upon such issue, approve such project or such participation by voting in favor thereof at an election to be held for that purpose or at the next primary or general election. Such election shall be provided for by resolution of Council. (Initiative. Passed 11-2-71.)

1528.03 SEVERABILITY.

If any sentence, clause, section or part of this chapter is found to be unconstitutional, illegal or invalid, such unconstitutionality, illegality or invalidity shall affect only such clause, sentence, section or part of this chapter and shall not affect or impair any of the remaining provisions, sentences, clauses, sections or other parts of this chapter. It is hereby declared to be the intention of the electors that this chapter would have been adopted had such unconstitutional, illegal or invalid sentence, clause, section or part thereof not been included herein. (Initiative. Passed 11-2-71.)

The Government seeks an order generally enjoining Parma and all its agents and officers from continuing to pursue its discriminatory housing practices and affirmative relief aimed at having the City undertake measures to correct the effects of its past unlawful conduct.

By memorandum opinion and order dated September 5, 1973, this Court denied Parma's motion to dismiss the Government's suit. It was ruled *inter alia* that a municipality is a "person" subject to suit under Section 3613 of the Fair Housing Act, and that the Government's complaint stated a claim for relief.

C 73-437 (hereinafter referred to as the Cornelius suit) was initially instituted by the Cleveland Chapter of the NAACP; the Housing Task Force; the Ozane Construction Company; five low and moderate income black plaintiffs presently residing in the Cleveland Metropolitan Area (but not Parma) who allege that they desire to reside in Parma but are prevented from doing so by the alleged racially discriminatory practices and policy of the City; and two white citizens of Parma charging that Parma's discriminatory policy deprives them of the social, economic, and professional benefits of an integrated community. The action seeks redress for alleged violations of rights secured by the Thirteenth and Fourteenth Amendments, the Civil Rights Act of 1866 (42 USC §1981, §1982), the Civil Rights Act of 1871 (42 USC §1983), and the Fair Housing Act of 1968 (42 USC §3601). Jurisdiction is predicated on 28 USC §1343(3) and (4), 28 USC §2201, and 42 USC §3612. The named defendants are the City of Parma, its Mayor, its President of the City Council, and its Councilmen.

The complaint in *Cornelius* sets forth detailed allegations relative to the racial composition of defendant City and the circumstances surrounding Parma's blocking of

the Forest City section 236 project. It is alleged, for example, that while Parma is the largest suburb in Cuyahoga County, having a population of approximately 100,216 residents, only .015% of the black population of the County, or fifty persons, reside in the City.

A fair reading of the complaint indicates that its basic thrust is directed against Parma's adoption and implementation of the ordinances previously discussed in regard to the Government's suit. It is alleged that the City's conduct, in enacting and implementing these ordinances, was aimed at setting up barriers to exclude low and moderate income blacks and other minorities from living in the City. The ordinances are said to have the further effect of maintaining the virtually all-white character and image of Parma, depriving white residents of Parma of the benefits of an integrated community, discouraging prospective builders and sponsors of low-income housing from building within the City of Parma, interfering generally with federally assisted housing programs, and excluding blacks and other minorities from equal access to jobs in the Parma area as well as equal access to educational opportunities. The plaintiffs in *Cornelius* seek as relief a declaration that the ordinances are void and of no effect, an injunction against Parma and its agents from engaging in further discriminatory housing practices and affirmative remedial action.

In a memorandum opinion and order dated September 18, 1973, the Court made the following rulings:

(1) The Cleveland Branch of the NAACP, the Ozane Construction Company, and the Housing Task Force lacked standing to sue.

(2) The action was untimely brought under 42 USC §3612 of the Fair Housing Act, which expressly sets forth a 180 day limitations period.

(3) Insofar as plaintiffs' complaint sought relief under 42 USC §1983 against the City of Parma, it was dismissed.

(4) The white individual plaintiffs lacked standing to sue under 42 USC §1982.

(5) The black individual plaintiffs could maintain their suit as a class action pursuant to 23(b)(2) F.R. Civ.P.[2]

II. PRESENT MOTIONS

Plaintiffs in *Cornelius* have filed several motions praying the Court to reconsider portions of its order of September 18, 1973. Plaintiffs seek reconsideration of: (a) the dismissal of plaintiffs' claim under the Fair Housing Act of 1968 and (b) the ruling that the white plaintiffs lack standing to sue. In addition, motion has been made pursuant to Rule 15 F.R.Civ.P. by the Cleveland Chapter of the NAACP to amend the complaint so that it may set forth allegations which it is contended would suffice to give it standing to sue.

By order dated November 9, 1973, the Court raised on its own motion whether plaintiffs, or any of them, in the *Cornelius* suit satisfy the threshold requirement imposed by Article III of the Constitution of alleging an actual case or controversy, and whether any or all the issues sought to be litigated by the Government in its suit are justiciable.

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2. The class the named black plaintiffs represent has been defined as follows:

> "All black citizens residing in the Greater Cleveland Metropolitan Area who are applicants or potential applicants for subsidized low and moderate income housing in the City of Parma, under the various programs enacted by the United States Congress or by the State of Ohio, who are being deprived by the actions or co-actions of the defendants of the right to reside therein."

In support of their respective positions, the parties submitted briefs, affidavits, and other supporting papers. Hearing was held on all questions pending before the Court on December 10, 1973.

III. CORNELIUS SUIT

A. Justiciability

The judicial power of federal courts is defined in Article III of the Constitution and is restricted to "cases" and "controversies." Giving expression to this case and controversy limitation is the doctrine of "justiciability," which is in itself no more than a "term of art" utilized by the courts to enforce the jurisdictional requirements of Article III. "Justiciability is . . . a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action." *Flast v. Cohen*, 392 US 83, 95 (1968).

In general, the doctrine of justiciability, in its various aspects, serves to assure that federal courts pass only on questions raised in actual controversies and which are appropriate for judicial determination.

Despite certain references in the *Cornelius* complaint to Parma's blocking of the section 236 project, it is unclear, as discussed more fully *infra*, whether these plaintiffs seek directly to challenge the building permit denial. Any such claim would in itself present substantial justiciability problems. See *infra*. But, there is no doubt that

plaintiffs' major purpose in instituting this suit is to seek both declaratory and injunctive relief relative to the two ordinances at bar.

A request for declaratory relief may be considered independently of whether other forms of relief are appropriate. *Powell v. McCormick*, 395 US 486, 518 (1969). The Federal Declaratory Judgment Act, 28 USC §2201, however, while providing an additional remedy to litigants, does not add to, or expand, the jurisdiction of federal courts. *Alabama State Federation of Labor v. McAdory*, 325 US 450, 461 (1944). An actual case or controversy is still required.[3] *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 US 667, 671 (1950); *Aetna Life Ins. Co. v. Haworth*, 300 US 227, 240 (1937). Thus in *United Public Workers of America v. Mitchell*, 330 US 75, 89 (1947), it was stated: "For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field." (Citations omitted.)

In determining whether a declaratory judgment should issue, courts must distinguish between the real case or controversy and the abstract, hypothetical dispute. This is often a difficult and delicate task. "Basically the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality. . . ." *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 US 270, 273 (1941). In the actual implementation of this test, the Supreme Court

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3. The language of 28 USC §2201 is significant:

"In a case of *actual* controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." (Emphasis added.)

has continuously emphasized the substantial degree of concreteness required in declaratory judgment actions. *See e.g., Laird v. Tatum*, 408 US 1 (1972); *Poe v. Ullman*, 367 US 497 (1961); *Communist Party of United States v. Subversive Activities Control Board*, 367 US 1 (1960); *See generally McCahill v. Borough of Fox Chapel*, 438 F.2d 213, 215-217 (3d Cir. 1971).

With the above principles in mind, the Court will pass on each of the claims arguably contained in the *Cornelius* complaint in order to determine whether, with regard to any or all of the Plaintiffs, such claims meet the tests of justiciability.

1. Black Plaintiffs

Plaintiffs' complaint as noted previously sets forth a number of factual allegations relative to Parma's denial of a building permit for construction by Forest City Enterprises of a section 236 project. The standing of future residents of proposed subsidized or public housing projects has been recognized in numerous cases where such persons have joined with developers or sponsors in concrete challenges to exclusionary actions of governmental authorities. *See e.g., Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972); *Sisters of Prov. of St. Mary of Woods v. City of Evanston*, 335 F.Supp. 396 (N.D. Ill. 1971); *Crow v. Brown*, 332 F.Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972); *Dailey v. City of Lawton*, 296 F.Supp. 266 (W.D. Okla 1969), *aff'd*, 425 F.2d 1037; *Kennedy Park Homes Assoc. v. City of Lackawana*, 318 F.Supp. 609 (W.D. N.Y. 1970), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 US 1010 (1971).

In each of the above-cited cases, however, the blocked developments were still viable; the builders and sponsors by bringing suit affirmatively indicated their continuing

interest in pursuing their projects to completion. Standing was accordingly granted to future residents as it was clear that live and real controversies existed regarding the projects sought to be built, and future tenants of the blocked developments had clear personal stakes in the outcome of the suits.

Here it is undisputed that Forest City Enterprises has abandoned its proposed project and is not itself contesting Parma's conduct relative to the project.[4] Although it can be said that the future residents of this project may have been injured by Parma's activity, no live controversy presently exists regarding this housing. Indeed, plain-

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4. In an affidavit dated November 19, 1973, by Mr. Nathan Shafron, Executive Vice-President of Forest City Enterprises, it was explained that even though Forest City Enterprises, at the time its building permit application was denied, had already expended Fifty Thousand Dollars in preparatory work, it deliberately decided not to pursue any rights it may have had to build the project. This decision was based on what it considered to be the intensity of citizen opposition to the project and the likelihood that expensive and time-consuming litigation would be necessary to establish its right to build the project (Shafron Aff. ¶8, 9.)

At approximately the same time it made the decision, however, Forest City Enterprises requested the Federal Housing Administration, which had preliminarily approved the construction of the section 236 project in Parma, to grant it permission to build a virtually identical ten story hi-rise development in Parma Heights on a site only a few hundred feet west of the original site in Parma. This request was granted, the requisite municipal approval was obtained, and the project was completed in October, 1973 (Shafron Aff. ¶10.)

Upon receiving approval from the F.H.A. to build in Parma Heights, Forest City Enterprises gave F.H.A. officials assurance that it would not build on the original site in Parma for a period of two years in order to allow the Federal Government to bring any suit it felt was appropriate, and absorb the economic loss that would result from holding the land in an undeveloped stage. (Shaffon Aff. ¶11.)

Recently, however, Forest City Enterprises made the business judgment to honor its commitment until no later than February or March of this year and is presently developing plans and submitting proposals to the proper authorities in Parma to develop the site for commercial purposes. (Shafron Aff. ¶13.)

tiffs accept this reality, for as shown by their complaint none of them have alleged that they were themselves prospective tenants of the Forest City development. Nor do they seek to represent a class so limited.[5]

In any event, the basic thrust of plaintiffs' complaint is admittedly directed at the validity of the two Parma ordinances passed by initiative vote in November, 1971. Whether this challenge is being made in the context of a justiciable controversy is the pertinent issue for consideration.

It is undisputed that the challenged ordinances are simply "on the books"; they have not as yet been applied to any proposed federally subsidized housing project arguably within their ambit. Plaintiffs argue, however, that the passage and implementation of the ordinances directly and immediately injures them. The Court is unable to perceive how this is so.

The ordinance setting forth the thirty-five foot height limitation is on its face entirely neutral, applicable both to housing designed for rich and poor, and by its own force alone does not prevent plaintiffs from residing in Parma. Moreover, no allegation has been advanced that defendants, in reliance on this ordinance, have prohibited the construction of a low-income project with the intent and result of preventing plaintiffs, or any of the class they represent, from residing in the City. *See e.g., Sisters of Prov. of St. Mary of Woods v. City of Evanston, supra.* Nor has it been alleged that Parma has enacted the requirement to serve or operate as a barrier specifically designated to block an actual project from going forward. *See e.g., Park View Heights v. City of Black Jack, supra.* The most that can be drawn from plaintiffs' complaint is that

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5. See note 2 *supra.*

the ordinance was enacted at approximately the same time that Forest City Enterprises' building permit application was denied. But it is nonetheless clear that this ordinance was never applied to that now defunct project.

To be sure, the ordinance setting forth the referendum requirement does on its face purport to subject any development of low-income public housing or any participation by any housing development in the Federal Rent Supplement Program to public approval before such development or participation may go forward. By its own force, this ordinance places special burdens on the construction of housing in defendant City for which many of the named black plaintiffs at bar would be eligible. Yet here too the Court is being asked to render an essentially advisory opinion as to the validity of this ordinance absent circumstances where it is being applied or even threatened to be applied.

Plaintiffs argue that the mere existence of this ordinance operates to "chill" or deter builders from coming forward with proposals for housing suitable to their needs. In support of this contention, counsel have submitted a number of affidavits from private developers in the Cleveland Metropolitan Area which indicate that it is their policy to refrain from attempting to build subsidized housing in communities where their projects would be submitted to voter approval.[6]

Many of these affidavits, however, are predicated on the belief that Parma would apply this ordinance to private subsidized projects for moderate income residents such as, for example, those financed pursuant to section 236 of the National Housing Act, 12 USC 1715z-1. The Court's reading of the ordinance is that it would not apply to

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6. *See e.g.*, Aff. of George Clarke Martin (Dec. 5, 1973); Aff. of Alan Gressel (Dec. 3, 1973); Aff. of A. F. Orlean (Nov. 30, 1973).

section 236 developments except insofar as any such project seeks to participate in the Federal Rent Supplement Program, 12 USC §1701s.[7] The uncertainty, however, as to what sorts of projects Parma would apply the ordinance serves only to underscore the hypothetical and contingent nature of the suit at bar.

With regard to the ordinance's effect on the construction of public housing within Parma, it is undisputed that the City has not as yet entered into any local cooperation agreement with the Cuyahoga Metropolitan Housing Authority in accordance with 42 USC §1415(7)(a) and (b).[8]

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7. This view is not based simply on a reading of Parma's Ordinance, but reflects also the Court's awareness that the referendum procedures of Article XXXIV of the California State Constitution, upon which Parma's Ordinance has been substantially patterned, have been construed by California's Attorney General not to be applicable to Sections 236, 235 and 221(d)(2) (National Housing Act §§1715z-1, 1715z and 1715[1]) type low rent housing projects acquired, developed or constructed by private persons or corporations and subsidized and insured by the Federal Government. See 54 Ops. Atty. Gen. 168 (1971).

8. 42 USC §1415(7)(a) and (b) provides: (For a general discussion of this statute, *see Mahaley v. CMHA, supra,* at pp. 1247-48.)

"In recognition that there should be local determination of the need for low-rent housing to meet needs not being adequately met by private enterprise—

(a) The Authority shall not make any contract with a public housing agency for preliminary loans (all of which shall be repaid out of any moneys which become available to such agency for the development of the projects involved) for surveys and planning in respect to any low-rent housing projects initiated after March 1, 1949, (i) unless the governing body of the locality involved has by resolution approved the application of the public housing agency for such preliminary loan; and (ii) unless the public housing agency has demonstrated to the satisfaction of the Authority that there is a need for such low-rent housing which is not being met by private enterprise; and

(b) The Authority shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, (i) unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required by the Authority pursuant to this chapter. . . ."

As a consequence, no public housing may as yet be built in that community under the auspices of the CMHA. This refusal on the part of Parma and a number of other suburban communities to provide for public housing in the face of its clear need is currently under judicial scrutiny. *Mahaley v. CMHA*, 355 F.Supp. 1257 (N.D. Ohio 1973) (Appeal Pending). But at this stage in time, it is entirely conjectural as to what relationship the referendum requirement ordinance has relative to any decision by Parma or its officials to enter into such an agreement.[9] Therefore, it is again the case that even in the area of public housing, the ordinance's actual effect is at present uncertain.

Plaintiffs' reliance on a number of cases which permitted broad classes of low-income persons directly to challenge alleged governmental discriminatory practices in housing is misplaced. *See e.g., Mahaley v. CMHA, supra*; *Banks v. Perk*, 341 F.Supp. 1175 (N.D. Ohio 1972), *aff'd in part, reversed in part*, 473 F.2d 910 (6th Cir. 1973); *James v. Valtierra*, 313 F.Supp. 1 (N.D. Cal. 1970), *rev'd on other grounds*, 402 US 137 (1971); *Ranjel v. City of Lansing*, 293 F.Supp. 301 (W.D. Mich. 1969), *rev'd on other grounds*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 US 980 (1970); *Gautreaux v. C.H.A.*, 265 F.Supp. 582 (N.D. Ill. 1967). In all the above-cited cases, what was being challenged was governmental conduct which clearly and affirmatively affected the rights of plaintiffs bringing suit and actual controversies were so presented to the courts that effective relief could be fashioned, if such was necessary. The courts did not have to speculate concern-

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9. It would seem, however, that in passing the referendum requirement ordinance, the citizens of Parma were seeking to substitute their direct approval for the discretion of their public officials in regard to any decision to enter into a cooperation agreement.

ing the direct and immediate interests of the plaintiffs, as this was patently evident.

The circumstances involved in *James v. Valtierra, supra,* are instructive. There plaintiffs, citizens of San Jose and San Mateo Counties, California, were "persons of low income who had been determined to be eligible for public housing and who had been placed on the appropriate waiting list." *See* 313 F.Supp. at 3. Principal defendants were the respective housing authorities of San Jose and San Mateo. Plaintiffs challenged the decision of these housing authorities not to request federal assistance with which to finance the construction of additional public housing units without prior approval by community vote as required by Article XXXIV of the California State Constitution.[10] As relief, plaintiffs prayed the Court to

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10. The full text of Article XXXIV is as follows:

"ARTICLE XXXIV PUBLIC HOUSING PROJECT LAW

§1. Approval of electors; definitions

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term 'low rent housing project' any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding."

declare Article XXXIV unconstitutional, and enjoin defendants from relying on it as a reason for not seeking federal financing. The dispute in *Valtierra* between plaintiffs and defendants, accordingly, was real and immediate. The putatively illegal policy of the housing authorities in deferring to the strictures of Article XXXIV had a direct and real effect on the immediate possibilities of the plaintiffs to have housing built which would be suitable to their needs, and the Court was in a position where it could fashion effective relief.

Mahaley v. CMHA, supra, is also worthy of close examination. There, actions were brought by classes of tenants and applicants for public housing in the Cleveland Metropolitan Area challenging *inter alia* the alleged unconstitutional acts of a number of suburban municipalities (including defendant City herein) in declining to enter into cooperation agreements with the Cuyahoga Metropolitan Housing Authority. Such agreements were necessary under the applicable law before any development of public housing in a particular locality could proceed.[11] The CMHA, a party to that suit, was shown to have taken sufficient affirmative steps to induce the defendant municipalities to allow public housing to be constructed within their boundaries. *Id.* at 1261-62. Under these circumstances, therefore, the conduct of the municipalities had a direct and immediate impact on plaintiffs bringing suit; and the Court was presented with a real and substantial controversy in which, again, effective relief could be fashioned.

In the instant suit, however, the Court is not presented with like circumstances. The challenged conduct of Parma in enacting the ordinances has not as yet directly and immediately injured plaintiffs. No actual conflict has yet

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11. See note 8 *supra.*

arisen between the rights of the low and moderate income plaintiffs and the actions of the defendants relative to these ordinances. Indicative of the presence of abstract injury only is the fact that if the Court were to entertain this suit and on the merits declare the suspect ordinances invalid, this judicial action would not serve as the catalyst for the construction of the housing undeniably needed by plaintiffs. Public authorities and private sponsors would still be needed to come forward.

Accordingly, it must be held that challenge to the Parma ordinances is not being made in the context of a real and substantial controversy of sufficient immediacy or concreteness to warrant adjudication. *Golden v. Zwickler,* 394 US 103, 109 (1969). As the Supreme Court stated in *Thorpe v. Housing Authority,* 393 US 268, 284 (1969):

> "We do not sit . . . to 'decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision.' *Alabama State Federation of Labor v. McAdory,* 325 US 450, 461."

2. NAACP

The NAACP, in moving to further amend plaintiffs' complaint pursuant to Rule 15, F.R.Civ.P., seeks to cure the defects in pleading previously found by the Court in its order of September 18, 1973.[12] It seeks now to allege in substance that the conduct of defendants here being

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12. There it was found that the NAACP had alleged only a broad general interest in the question presented by the suit. No allegations had been made that the NAACP, or any of its membership, was actively and concretely engaged in specific projects for the development of low income or other federally subsidized housing within the City of Parma. Nor were any allegations advanced that the NAACP or any of its members had been specifically aggrieved by the conduct of Parma.

challenged has a direct and personal adverse effect on its low and moderate income members and on the Chapter itself in representing their interests.

For the reasons stated in the preceding section, even if leave to amend were granted, this plaintiff would not present the Court with a justiciable controversy. Therefore, this motion is denied.

3. White Plaintiffs

The two white plaintiffs in the *Cornelius* suit allege that they are at present residents of Parma who, due to the alleged discriminatory housing practices of their municipality, have been "denied the social, economic, and professional benefits of an integrated community and are embarrassed or otherwise suffer, being stigmatized in the white ghetto of Parma." It is averred that Parma's conduct constitutes injury to rights secured to them by the Fair Housing Act of 1968, 42 USC §3601 *et seq.*, and the Civil Rights Act of 1866, 42 USC §1982. In support of their contention that they have standing to maintain this action, plaintiffs rely on the Supreme Court's recent decision in *Trafficante v. Metropolitan Life Ins. Co.*, 409 US 205 (1972).

Trafficante involved an action brought by two tenants (one white and one black) of a large apartment complex in San Francisco. The tenants alleged that their apartment owners had engaged in numerous discriminatory housing practices, and that as a result of these practices they had been denied the various benefits of interracial associations, suffering much the same injuries as are alleged by the white plaintiffs herein. They sought relief both under 42 USC §1982 and 42 USC §3610 of the Fair Housing Act of 1968.

The Supreme Court considered only the tenants' rights under 42 USC §3610. It held that the tenants fall within the scope of "persons aggrieved" contained therein and, accordingly, could maintain an action pursuant to that statute.

The Court noted that the definition of "persons aggrieved" in 42 USC §3610(a) was broad,[13] *Id.* at 208. And that the injury alleged by the tenants was not insubstantial. *Id.* at 209. Further, it was observed that the important purposes of the Fair Housing Act would only be frustrated by rigid standing requirements. As "complaints by private persons are the primary method of obtaining compliance with the Act," such standing requirements should be construed as broadly as is permitted by Article III of the United States Constitution. *Id.* at 209. The importance of "private attorney general" suits in effectuating modern legislative programs was also underscored. It was observed that such suits would in particular "serve an important role in this part of the Civil Rights Act of 1968 in protecting not only those against whom a discrimination is directed but also those whose complaint is that the manner of managing a housing project affects 'the very quality of their daily lives.'" *Id.* at 211. The Court concluded:

> "We can give vitality to Section 810(a) [42 USC §3610(a)] only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute." *Id.* at 212.

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13. Section 3610(a) provides in pertinent part: "Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter 'person aggrieved') may file a complaint with the Secretary."

This Court, in its memorandum opinion and order of September 5, 1973, dealing with the Government's suit recognized that municipalities may be subject to suit under the Fair Housing Act. *See also Park View Heights Corp. v. City of Black Jack, supra,* 467 F.2d 1208 (8th Cir. 1972); *Kennedy Park Homes Assoc. v. City of Lackawanna, supra,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 US 1010 (1971); *United States v. City of Black Jack, supra,* ..... F.Supp. ..... P.H.E.O.H. Rptr. Para. 13,561 (E.D. Mo. 1972); *Sisters of Prov. of St. Mary of Woods v. City of Evanston, supra,* 335 F.Supp. 396 (N.D. Ill. 1971). Therefore, it would seem that in light of *Trafficante* a white tenant of a project owned by a municipality would have standing to challenge racial discrimination in the management of those facilities amounting to violations of the applicable provisions of the Fair Housing Act.

The issue presented by these plaintiffs, however, is broader. They submit that their legal right to interracial association, as recognized by *Trafficante,* extends so far as to enable them to challenge the alleged racial exclusionary activities of the city wherein they reside.

There are clear indications in *Trafficante* that the standing of persons to vindicate rights to interracial association is limited to circumstances where suit is brought against the management of their own housing facilities. The precise holding in that case was to accord standing "to *all in the same housing unit* who are injured by racial discrimination in the management of those facilities. . ." *Id.* at 211 (emphasis added.) Yet it must be observed that the housing complex under consideration in *Trafficante* was comprised of 8,200 residents and was therefore, larger than many towns in this country. *Id.* at 206. Moreover, less than 1% of the tenants in the complex were black. *Id.* at 208 fn. 5. Accordingly, it would not be an unrea-

sonable extension of *Trafficante*, and well within its spirit, to rule that white residents of a city like Parma, whose population barely exceeds 100,000, and whose black population is well below 1%, could challenge, under the Fair Housing Act, any purported racially exclusionary activity pursued by the City.

Assuming *arguendo* that *Trafficante* may be read to cover the activities of cities like Parma, the Court must still decide whether these plaintiffs set forth timely and justiciable causes of action either under the Fair Housing Act or 42 USC §1982. It is concluded that they do not.

Plaintiffs' challenge to the two ordinances does not present the Court with a justiciable controversy under either statute. As was previously noted with regard to the black plaintiffs, these ordinances have not as yet been applied, or ever threatened to be applied. In consequence, they have not operated in any concrete sense to injure any rights arguably secured to the white plaintiffs.

Again, as with the black plaintffs, it is unclear whether the *Cornelius* complaint squarely challenges Parma's denial of a building permit to the Forest City project. The white plaintiffs do not allege that they were even residents of Parma at the time this project was blocked.[14] Clearly, however, if they were Parma residents at that time, it could well be contended that the blocking of this project, destined for integrated occupancy, injured their newly framed *Trafficante* rights to interracial associations.

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14. Plaintiffs Robert Cain and Reverend Kenneth Coy are merely defined in the *Cornelius* amended complaint as: "white citizens of the United States and residents of Parma, Ohio." They seek to represent a class defined as follows: "All white citizens residing in Parma who are deprived of economic, social, and professional relations with minorities and who are being injured by being stigmatized in a white ghetto."

Yet, plaintiffs' action under the Fair Housing Act is bottomed on 42 USC §3612. This section provided in pertinent part:

> "The rights granted by Sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy. . . . A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred."

The Court noted that plaintiffs did not institute their action until April 27, 1973, and the denial of the building permit for the Forest City project occurred and ended in November, 1971. Plaintiffs' action under the Fair Housing Act, therefore, to the extent it seeks judicial review of this denial, is untimely. It was filed more than one hundred eighty days after this alleged discriminatory housing practice took place. *See James v. Hafter*, 320 F.Supp. 397 (N.D. Ga. 1970), *aff'd.*, 457 F.2d 511 (5th Cir. 1972); *Brown v. Ballas*, 331 F.Supp. 1033 (W.D. Tex. 1971). *Cf. Goodman v. City Products Corp.*, 425 F.2d 702 (6th Cir. 1970).

Nor do the white plaintiffs at bar have standing under section 1982 to challenge the denial of the building permit.[15] Their legal interests to interracial associations, while cognizable under the Fair Housing Act do not fall "arguably within the zone of interests to be protected" by section 1982. *Cf. Sierra Club v. Morton*, 405 US 727 (1972).

In *Jones v. Alfred H. Mayer Co.*, 392 US 409 (1968), section 1982 was substantially revitalized. There it was

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15. 42 USC §1982 provides: "All citizens of the United States shall have the same rights, in every state or territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

held that the statute barred all racial discrimination in the sale or rental of property and, thus construed, was a valid exercise of congressional power under the Thirteenth Amendment. As was observed, however, by the Ninth Circuit Court of Appeals in its treatment of *Trafficante* at 446 F.2d 1158, 1163:

> "[There is] nothing in *Jones v. Alfred H. Mayer* to indicate that Section 1982 would be construed to grant standing to sue to anyone other than a person who was the victim of racial discrimination in the sale or rental of property."

It was said, in addition:

> "The Court's examination of the legislative history of the Civil Rights Act of 1866 in *Jones v. Alfred H. Mayer, supra,* makes it clear that the purpose of Congress was to forbid racial discrimination affecting the basic civil rights enumerated therein, including the right to purchase or lease property, and to guarantee the newly freed slaves the property rights enjoyed by white citizens.... We find no indication that Congress intended to allow either third-party enforcement of the rights granted by Section 1982, or an independent right of action in a person who has not been stamped with a 'badge of slavery' either by an act of discrimination or some racially motivated interference with his property rights."

While a number of cases decided subsequent to *Jones* have accorded standing to white plaintiffs under section 1982, *See e.g., Sullivan v. Little Hunting Park, Inc.,* 396 US 229 (1969); *Williamson v. Hampton Mgmt Co.,* 339 F.Supp. 1147 (N.D. Ill. 1972); *Walker v. Pointer,* 304 F.Supp. 56 (N.D. Tex. 1969), none may be read as supporting the proposition that white citizens who are not directly af-

fected by black racial discrimination in the enjoyment of their property rights, may sue under that statute. In *Sullivan*, the white plaintiff had been expelled from a community recreation club because in the course of renting property, he had assigned club membership rights to a black person. In *Walker* the white plaintiffs had been evicted from their apartment because they had entertained black guests there. In *Williamson* the white plaintiff's right to sublet her apartment was interfered with on racial grounds. All of the white plaintiffs in these cases had themselves been "direct victims of black racial discrimination, discrimination directed at them because of their black associations." *Walker v. Pointer, supra,* at 58.

It is true that the Supreme Court's decision in *Trafficante* does not resolve the question of standing under section 1982 to vindicate rights to interracial associations. That issue was not reached. *Id.* at 209 fn.8. The concurring opinion of Mr. Justice White, however, joined by Justices Blackman and Powell, is revealing. There it was observed:

> "Absent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioner's complaint in this case presented a case or controversy within the jurisdiction of the district court under Article III of the Constitution."

Significantly, this Court's reading of section 1982 is buttressed by more recent comments of the Supreme Court clarifying the true nature of its holding in *Trafficante*. In both *Linda R.S. v. Richard D.*, 410 US 614, 617 n.3 (1973) and *O'Shea v. Littleton, supra,* ..... US ..... (1974), 42 U.S.L.W. 4139, 4141 n.2, the Court noted in dealing with the justiciability problems there involved: "Congress may enact statutes creating legal rights, the invasion of which

creates standing *even though no injury would exist without the statute. See e.g., Trafficante v. Metropolitan Life Ins. Co.*, 409 US 205, 212 (1972) (White, J. concurring); *Hardin v. Kentucky Utilities Co.*, 390 US 1, 6 (1968)." (Emphasis added.) This statement is contained in the majority opinion of both the above-cited cases. It may only be read as an indication that whatever right there is to redress injury to interracial associations arises solely from the Fair Housing Act; and that the rights secured by section 1982, accordingly, are not co-extensive, in this regard, with those conferred by the 1968 Act.

The purpose of the Fair Housing Act and section 1982 are, to be sure, substantially parallel. Both were generally designed to prohibit discrimination in housing. But section 1982 does differ markedly from the 1968 Act both in purpose and scope. There are "vast differences between, on the one hand, a general statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority." *Jones v. Alfred H. Mayer Co., supra,* at 417. The Fair Housing Act is a comprehensive legislative effort designed to remedy a pressing social need. As recognized in *Trafficante,* Congress intended, by its broad definition of "persons aggrieved" in the Fair Housing Act, to enable all persons to redress injury to the right to interracial association. Regretfully, this newly created right may not be read into section 1982, the Fair Housing Act's Nineteenth Century counterpart.

Accordingly, the Court reaffirms its holding made in the memorandum opinion and order of September 18, 1973,

that the white plaintiffs lack standing under 42 USC §1982 to litigate their rights to interracial associations.[16]

IV. GOVERNMENT SUIT

The Attorney General has instituted suit under the Fair Housing Act of 1968, 42 USC §§3601 *et seq.*, seeking to challenge Parma's alleged wholesale deprivation of rights under the Act.[17] One of the City's acts which the Government suit seeks to review is the denial of the building permit to Forest City Enterprises.

Defendant Parma, in arguing that the United States lacks standing to challenge this permit denial states:

> "It would be a scandal of major proportions for the Attorney General, in the name of the United States of America, to expend taxpayers' money in an attempt to vindicate any alleged claims on behalf of a highly successful builder and promoter."

This argument is more shrill than persuasive and merits but little discussion.

The Attorney General's suit is jurisdictionally based on 42 USC §3613. This section provides:

> "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he

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16. All private plaintiffs may appear as *amicus curiae* in the Government suit.

17. In addition, the United States bases its cause of action on the Thirteenth and Fourteenth Amendments.

> may bring a civil action in any appropriate United States district court. . . ."

Actions brought pursuant to this section should not seek simply to redress the private interests of any particular citizen or business entity, although this of course may be partially what is at stake. Nor should suit be brought to challenge isolated, accidental, or peculiar discriminatory acts or conduct. *See United States v. Pelzer Realty Co.*, 484 F.2d 438 (5th Cir. 1973); *United States v. Peachtree Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971). Rather, the larger purpose is to enable the Attorney General, in his official capacity as chief law enforcement officer of the United States, to protect the interest of the United States in seeing that its laws are enforced. *United States v. Northside Realty Associates*, 324 F.Supp. 287, 292 (N.D. Ga. 1971), *remanded on other grounds*, 474 F.2d 1164 (5th Cir. 1973); *United States v. Leubke*, 345 F.Supp. 179, 181 (D.C. Colo. 1972).

Parma's denial of the building permit affects the rights and interests of many others besides the particular developer or promoter. It manifestly had a pronounced effect on those who would have been residents of the project if it had been allowed to go forward. Since it can be said that this act constitutes a denial of rights under the Fair Housing Act to a group of persons, the matter is properly raised for adjudication under 42 USC §3613.[18]

The Government also seeks to directly challenge the passage and implementation of the two Parma ordinances as part of its pattern or practice action. But, as was dis-

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18. The initial determination of whether a denial of rights raises a question of public importance is left to the discretion of the Attorney General. *United States v. Northside Realty Assoc., Inc.*, 474 F.2d 1164, 1168 (5th Cir. 1973); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir. 1973), *cert. denied*, ... US ..... (1973).

cussed previously, these ordinances may not be said to have operated in any real sense to deny or make unavailable dwellings on the basis of race. See 42 USC §3604(a). Nor have they as yet interfered with sponsors of federally assisted housing who seek to aid persons in exercising their right to equal housing opportunities. See 42 USC §3617.

Accordingly, the Attorney General does not have standing to raise the validity of these ordinances within the ambit of his pattern or practice suit.[19] However, should the remaining allegations be proven and if affirmative relief is granted, it may be necessary in fashioning appropriate relief for the Court to deal with these ordinances. *See e.g., Gautreaux v. City of Chicago,* 480 F.2d 210 (7th Cir. 1973).

CONCLUSION AND ORDER

Accordingly, IT IS HEREBY ORDERED:

(1) That plaintiffs' amended complaint in the *Cornelius* suit be dismissed;

(2) That plaintiff NAACP's motion to amend the *Cornelius* complaint is denied; and

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19. As noted previously, the United States complains that the ordinances violate the Thirteenth and Fourteenth Amendments. Case authority recognizes that the United States has an implied civil cause of action to seek the removal of impediments to interstate commerce. It is reasoned that such an action is inherently within the national power to regulate commerce. *See e.g., In re Debs,* 158 US 564 (1895); *United States v. City of Jackson, Mississippi,* 318 F.2d 1 (5th Cir. 1963); *United States v. Brand Jewelers, Inc.,* 318 F.Supp. 1293 (S.D. N.Y. 1970). Judge Frankel in *Brand Jewelers,* in addition to recognizing an action under the commerce clause, held in the alternative that the Fourteenth Amendment also provided an implicit cause of action to the United States to seek redress for "widespread" due process deprivations. Here, however, the existence of the ordinances do not afford standing to the Attorney General with respect to any implied cause of action arguably present under either amendment. As yet, there has been no deprivation of private rights.

(3) That the Government's complaint, insofar as it seeks to directly challenge the two Ordinances, is dismissed.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
Chief Judge

ORDER OF DISTRICT COURT DISMISSING AMENDED COMPLAINT

(Filed February 25, 1974)

Civil No. 73-437

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JACQUELINE CORNELIUS, *et al.*,
Plaintiffs,

VS

CITY OF PARMA,
Defendant.

ORDER

Pursuant to the Court's Memorandum Opinion and Order of February 22, 1974,

IT IS ORDERED that plaintiff's amended complaint is hereby dismissed.

/s/ FRANK J. BATTISTI
Chief Judge

ORDER OF SUPREME COURT

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D.C. 20543
June 30, 1975

Robert R. Soltis, Esq.
Special Counsel - City of Parma
Parma City Hall
6611 Ridge Rd.
Parma, Ohio 44129

RE: CITY OF PARMA, OHIO, ET AL. v.
JACQUELINE CORNELIUS, ET AL.,
74-970

Dear Sir:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Warth v. Seldin*, 422 U.S. ..... (1975).

Mr. Justice Douglas took no part in the consideration or decision of this petition.

Encl. = cc opin. in
73-2024, *Warth v. Seldin*

Very truly yours,

Michael Rodak, Jr., Clerk
By
/s/ Helen Taylor
Helen Taylor (Mrs.)
Assistant Clerk

James P. Mulkeen, Esq.
Nat'l Comm. against Discrimination in Housing, Inc.
Suite 410 - 1425 H St., N.W.
Washington, D.C. 20005

ORDER OF COURT OF APPEALS UPON REMAND

(Filed September 24, 1975)

No. 74-1401

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACQUELINE CORNELIUS, *et al.*,
Plaintiffs-Appellants,

VS.

CITY OF PARMA, *et al.*,
Defendants-Appellees.

ORDER

Before: EDWARDS, PECK and MCCREE, *Circuit Judges.*

On receipt and consideration of an order of the United States Supreme Court, dated June 30, 1975, vacating this court's previous judgment in the above-styled case and remanding "for further consideration in the light of *Warth v. Seldin,* 422 U.S. ..... (1975)"; and

After careful study of the majority and dissenting opinions in *Warth, supra;* and

Believing it to be completely dispositive of the instant litigation;

Said appeal is now remanded to the District Court with instructions to dismiss the complaint.

Entered by order of the Court

/s/ JOHN P. HEHMAN
Clerk

JUDGMENT OF COURT OF APPEALS

(Filed October 14, 1981)

No. 81-3031

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

CITY OF PARMA, OHIO,
Defendant-Appellant.

Before: LIVELY, KEITH and MERRITT, *Circuit Judges.*

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order appointing a special master is reversed. The partial stay heretofore entered by this court is dissolved. The judgment of the District Court is affirmed in part and reversed in part as indicated in the opinion of this Court.

Each party to bear own costs on this appeal.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

ORDER DENYING PETITION FOR REHEARING AND DISSENTING OPINION OF JUDGE PAUL C. WEICK

(Filed December 10, 1981)

No. 81-3031

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CITY OF PARMA, OHIO,
Defendant-Appellant.

Before: LIVELY, KEITH and MERRITT, *Circuit Judges.*

Less than a majority of the judges in active service having favored consideration *en banc* of the petition for rehearing filed herein by the defendant-appellant, the petition has been referred to the hearing panel for disposition. Upon consideration the court concludes that all issues raised in the petition for rehearing were considered and decided by the court upon the original submission and that rehearing is not required.

The petition for rehearing is denied.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

United States of America v. City of Parma, Ohio

No. 81-3031

WEICK, *Circuit Judge*, dissenting: I respectfully dissent from the denial of en banc consideration of Parma's appeal.

This case, following the pattern and practice of federal courts in the desegregation of Ohio's public schools by forced bussing, involves a similar effort to desegregate the residential neighborhoods of Ohio's municipalities by specific performance of the Fair Housing Act, 42 U. S. C. 3601 *et seq.* The decision of Chief Judge Battisti, who considered the case for seven years before deciding it and its affirmance by a divided panel of this court has engendered considerable publicity in the media. Typical is an editorial appearing in The Cincinnati Enquirer of February 1, 1981, entitled "The Judiciary, Parma falls victim to another excess by a federal court", a copy of which is appended hereto.

I favored and voted for en banc consideration of Parma's petition for rehearing for the reasons set forth therein supported by the authorities therein relied upon which in my opinion compel a different result. Principally, the decision of Judge Battisti and a majority of the panel conflicts with the decisions of another panel of this court in *Mahaley v. Cuyahoga Metropolitan Housing Authority, et al.*, 500 F. 2d 1087 (6th Cir. 1974), *cert. denied*, 419 U. S. 1108 (1975) and *Joseph Skillken & Co. v. City of Toledo*, 528 F. 2d 867 (6th Cir. 1975) and 558 F. 2d 350 (6th Cir. 1977), *cert. denied*, 434 U. S. 985 (1977), *rehearing denied*, 434 U. S. 1051 (1978). It also conflicts with the decision of the Supreme Court in *James v. Valtierra*, 402 U. S. 137 (1971). It is not uncommon in our court for one panel of this court to write an opinion conflicting with the decision of another panel. This was commented upon with

supporting citations by the Harvard Law Review article in Volume 92, pages 931, 934 and 935 (1979). *Mahaley* requires different treatment because it involved similar issues of fact and law with identical parties or their privies so as to invoke the doctrine of *res judicata,* which we are required to comply with if not *stare decisis.* We also should follow decisions of the Supreme Court.

In *Federated Department Stores, Inc. v. Mortie,* ..... U. S. ....., 101 S. Ct. 2424, 2427 (1981), the Supreme Court stated:

> There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.

It is clear that the law in *Mahaley* is binding upon the plaintiffs, the district court and our court and we have no right to change it. The panel made no determination of the issue of *res judicata.*

On page 20 of the slip opinion it is stated: "*Mahaley* was a suit under the Housing Act of 1937, not the Fair Housing Act of 1968." This statement is incorrect as it was specifically stated by Judge Battisti that the suit was brought under "the Civil Rights Act of 1968, 42 U. S. C. Section 3601 *et seq.,* (Fair Housing Act), *Mahaley v. Cuyahoga Metropolitan Housing Authority, supra,* p. 1080. In his opinion, as a single judge, Battisti ruled that Parma and the other defendant cities discriminated against low income blacks and violated the Fair Housing Act. *Mahaley v. Cuyahoga Metropolitan Housing Authority,* 355 F. Supp. 1267, 1268. He tarred and feathered the entire population of these communities.

It was also incorrect for the panel to state that *Skillken* did not involve the Fair Housing Act as the opinion in that case expressly refers to Sections 3601 *et seq.* (Fair Housing Act). In *Skillken,* District Judge Young made intemperate remarks concerning the City Council and Plan Commission of Toledo as a "sad display of bigotry, intolerance and selfishness at its worse" which remarks we held were unsupported by the evidence and were clearly erroneous. We also held that federal courts were ill-fitted to operate municipal governments, which Judge Young in *Skillken* endeavored to do in following the procedures in school desegregation cases. In *Mahaley* we held that "the findings of discrimination are not supported by substantial evidence and are clearly erroneous." 500 F. 2d 1091 (n.2). The unsubstantial evidence referred to included "remarks by officials in defendant Parma."

Judge Merritt, in his dissent in part, points out the flimsy evidence on which the panel majority relied to support its findings of liability stating:

> My problem with the opinion of the court is that it allows to stand the lower court's finding of liability based upon "the failure of the city council to adopt a resolution welcoming all persons of good will to Parma," and the City's "reputation among black residents of the Cleveland area of hostility to racial minorities." (opinion, p. 21.) In order to remedy these wrongs, the District Court ordered the City to pass a welcoming resolution and adopt a comprehensive advertising program.

The opinion among black residents of Cleveland of Parma's reputation of hostility to racial minorities does not support the panel's majority finding of liability and it was error for the majority to so hold. This alone should justify

reversal of the judgment. It is noteworthy that *Mahaley*, the plaintiff, was not even a resident of Parma, but lived in Cleveland. It would therefore appear that blacks living in Cleveland are endeavoring to change living conditions in Parma, which is a large separate municipality. There was no showing that Parma was in any way responsible for the concentration of black persons living in Cleveland.

There was not an iota of evidence offered that black persons were excluded from living in Parma. Many of them do live in Parma, although Parma is predominantly white. There is no evidence that the blacks and whites do not get along together in Parma. Federal courts, however, are not authorized to violate the constitutional rights of people of whatever race to association. *NAACP v. Button*, 371 U. S. 415 (1963). Parma cannot be held liable for racial concentration in Cleveland or for the racial attitudes of individuals, real estate operators and lenders.

It was error for the panel to invalidate duly enacted zoning ordinances of Parma which apply to all people white or black. The panel's invalidation of Parma's mandatory referendum ordinance relating to low cost public housing and holding that it constituted discrimination to enact it, conflicts with the decision of the Supreme Court in *James v. Valtierra*, 402 U. S. 137 (1971), where the court on pages 142 and 143 stated:

> The people of California have also decided by their own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their

> own community. This procedure for democratic decisionmaking does not violate the constitutional command that no State shall deny to any person "the equal protection of the laws."

We relied on *James v. Valtierra, supra,* and quoted from it in *Mahaley,* p. 1092, but the panel has overturned *Mahaley* and obviously does not even agree with the Supreme Court.

It was wrong for the panel to invalidate legislation of a state legislative body for alleged racial motivation of the legislators or of the people of a community. We so held in *Rangel v. City of Lansing,* 417 F. 2d 321 (6th Cir. 1975), *cert. denied,* 397 U. S. 980 (1970), *rehearing denied,* 397 U. S. 1059 (1970). This is another instance of one panel ignoring the decision of another panel of this court.

The decision of the panel sets forth at length the decision of the district court on issues of liability and the huge comprehensive remedial order which undoubtedly will entail the expenditure by the taxpayers of Parma of millions of dollars. Noteworthy, is the extensive overbroad permanent injunction granted against the City and its officers and agents which is enforceable by contempt and reads as follows:

> The general provision permanently enjoined the City, its officers, etc. from:
>
> 1. Engaging in any conduct having the purpose or effect of perpetuating or promoting racial residential segregation or of denying or abridging the right of any person to equal housing opportunity on account of race, color, religion, sex or national origin;
>
> 2. Discriminating against any person or group of persons on account of race, color, religion, sex or na-

tional origin in connection with the planning, development, construction, acquisition, financing, operation or approval of any low-income or public housing units;

3. Interfering with any person in the exercise of his right to secure equal housing opportunity for himself or for others; and

4. Taking any action which in any way denies or makes unavailable housing to persons on the basis of race, color, religion, sex or national origin.

Slip opinion pages 9 and 10.

It is obvious that this permanent injunction is unprecedented and constituted an improper interference by a federal court with the governmental affairs of the City and its officers and agents and would be fruitful of much supervision and litigation.

It should be pointed out that Parma has not met with much favor in our court. Even its right to appeal was questioned. Parma filed a notice of appeal from the extensive judgment holding that it violated the Fair Housing Act and which entered a comprehensive and excessive remedial order, including injunction which appeal an administrative panel erroneously dismissed as not constituting a final order because the judge had not yet appointed a special master (receiver). Parma moved for an en banc hearing on the dismissal of its appeal, which was denied. One judge dissented from the denial of Parma's right to appeal, as it conflicted not only with decisions of our court but also those of the Supreme Court. Parma's motion for a stay pending appeal was questioned by a panel erroneously stating that Parma had not applied to the district judge for its stay which was not true. The appeal was finally allowed after the district judge appointed a special master with extensive powers, such as a receiver.

The decision of the panel if permitted to stand will have far reaching consequences, as it permits even the motivation of state legislators and people of a community in enacting legislation to be questioned and the legislation invalidated by a federal court, if the motivation is alleged to be racial. I submit that if the motivation of state legislators or people may be questioned in the passage of state legislation, then the same rule should be extended to the motivation of congressman, which could be questioned by either federal or state courts. The federal government should never be permitted to specifically enforce compliance with federal legislation which operates to interfere with the lawful operation of state governments.

Chief Judge Battisti has been noted for issuing of extreme orders. In the Cleveland school desegregation case, in addition to appointing masters with powers of a receiver, he issued an order enjoining the Supreme Court of Ohio from hearing a mandamus and prohibition case filed by two Cleveland banks against the Cleveland Board of Education to prevent the Cleveland Board from using funds levied to pay bonds for general operating expenses. A judge of this court issued a stay order and the Supreme Court of Ohio then heard and decided the case. *State ex rel. National City Bank v. Board*, 52 Ohio St. 2d 81 (1977). In *O'Neill, Chief Justice, et al. v. Battisti*, 472 F. 2d 789, 791 (6th Cir. 1977), we had the spectacle of the Chief Justice and Associate Justices of the Supreme Court of Ohio having to file in our court a suit in mandamus and prohibition to vacate an injunction issued by Judge Battisti against the Chief Justice and all Justices of the Supreme Court of Ohio vacating part of the Supreme Court's orders and preventing the Supreme Court from hearing a disbarment proceeding pending in its court against a Cincinnati judge of the Court of Domestic Relations. We granted the writ holding that the injunction of Judge Battisti was not only

improvidently granted, but also that he lacked jurisdiction over the Supreme Court Justices as the seat of the court was in the Southern District of Ohio, whereas Battisti sits in the Northern District of Ohio. The extreme actions taken by Judge Battisti in the present case and in other cases above mentioned do not operate to improve state and federal judicial relationships, which Chief Justice Burger sought in establishing State-Federal Judicial Councils.

The decision of the panel conflicts also with *Angell v. Manchester, et al.*, ... F. Supp. ..... (D. C. Conn. No. 79-229) 1981, 9 Housing and Development Reporter 420; 50 Law Week 2267. See also article in *The National Law Journal*, November 9, 1981, entitled "Housing Bias Decisions Illustrate U. S. Paradox" appended hereto.

In sum, it is not the function of the federal government to desegregate the residential neighborhoods of the state's municipal governments or to operate state municipalities by the appointment of masters or receivers.

A grievous wrong has been inflicted upon the municipal government of Parma, a charter city, by the federal government which was a party to the *Mahaley* case, where the controlling issues raised in the present appeal were adjudicated against the federal government by our Court of Appeals, when we reversed Judge Battisti and certiorari was denied by the Supreme Court. In defending *Mahaley* and the present lawsuit, Parma has been subjected to large legal expenses and the present lawsuit should never have been brought by the federal government after it lost *Mahaley*. The conduct of the government appears to have been vindictive.

It is suggested that the present Attorney General's Office carefully review this case and if it concludes that

the decision of the panel in the present appeal is erroneous, that it file in this court a confession of error so that the panel's erroneous decision may be expunged. This will save Parma the expense of taking this case to the Supreme Court and save the Supreme Court of the necessity of ruling upon and reversing the decision of the panel which is clearly wrong.

The decision of the panel is wrong. En banc consideration should have been granted.

Best Copy Available

The Cincinnati Enquirer - February 1, 1981

Editorial

THE JUDICIARY

Parma falls victim to another excess by a federal court

BY ALMOST ANY measure, Parma, Ohio, is a long way from Buckeye, La. But by the reckoning of the federal courts, it is not very far at all. Federal Judge Frank J. Battisti has found Parma guilty of violating the 1968 Fair Housing Act by enacting laws "motivated by a racially discriminatory and exclusionary intent and [which] had forseeable segregative effects."

It seems that Parma enacted a law requiring a referendum to approve any low-income housing project. In addition, ordinances prohibited any building over 35 feet in height and required 2½ parking places for each dwelling. The judge decided these laws discriminated against blacks. He set aside the restrictive ordinances, announced that the city needs "approximately 2,669" low-income housing units and ordered them built at the rate of 133 units a year. In addition, he appointed a "special master" to see that his orders are carried out.

The "special master" has the power to look into municipal actions, to attend public and private meetings and to report to the judge on any delays in implementing his decision.

It is the kind of legal episode that reminds us of the situation in which three young girls — under the jurisdiction of a federal judge — are to be denied admission to a high school in Buckeye, La., and assigned to attend a school some 15 miles distant in order to satisfy that judge's desegregation order.

In the case of Parma, the power of the federal government is to be used not because there are no blacks residing in Parma — there are — but because local laws complicate the building of low-income and multi-family residences. And that, Judge Battisti finds, is discriminatory.

Parma's attorney in the matter calls the judge's decision a revolution. "The federal government has only the powers delegated to it by local government," he says. "But now the federal government has taken over a local government, so one of the disastrous consequences of this decision is that it turns our form of government on its head."

And so it does.

The federal courts, one by one, no only want to run the lives of individua public school students, they want to ru the public schools and now the cities a well. These are tasks for which the ju diciary is eminently ill-equipped.

That constitutes in our mind a abuse of federal authority and a usurp tion of the power that is and ought to resting in the hands of the people.

Monday, November 9, 1981 THE NATIONAL LAW JOURNAL

Federal Policy Shift

Housing Bias Decisions Illustrate U.S. Paradox

By Larry Tell and Karen Schneider
Special to The National Law Journal

THE JUSTICE Department last month was handed a victory it probably didn't welcome — and a loss it seemed comfortable with — in two separate cases involving alleged housing discrimination in nearly all-white suburbs of Hartford, Conn., and Cleveland, Ohio.

The apparent paradox is a result of a shift in policy in the department's Civil Rights Division, now headed by Asst. Attorney General W. Bradford Reynolds, who has said he does not think the department should be filing the kind of far-reaching housing discrimination cases involved, both of which were undertaken before the Reagan administration came into office.

The federal government "is not in the business of telling localities what to build and where to build it," Mr. Reynolds has said.

The Oct. 14 Hartford decision, clearing Manchester, Conn., of charges of discriminating against minorities in its local housing policies, marked the first time that the Justice Department, one of the plaintiffs in the class action, has lost a housing discrimination case brought against a

Continued on page 14

RULING UPHELD: U.S. District Judge Frank J. Battisti's ruling that a Cleveland suburb had deliberately excluded minorities was upheld by the 6th U.S. Circuit Court of Appeals.

Ohio, Conn. Decisions Show Bias Policy Shift

Continued from page 3

municipality under the Fair Housing Act of 1968.

U.S. District Judge M. Joseph Blumenfeld ruled that Manchester voters weren't racially motivated when they decided, in a 1970 referendum, to withdraw from a federal grant program that required the town to promote integration and housing for the poor. (NLJ, May 18.)

In his ruling, Judge Blumenfeld held the citizens' revolt against the program violated neither the Fair Housing Act nor constitutional guarantees of equal protection. *Angell v. Zinser*, 78-220.

"Although it is clear to the court that there was present . . . some undercurrent of fear of a mass influx of poor blacks into Manchester, the court cannot find that this was a dominant factor or even that it was a factor in the votes of a majority of those voting in favor of the referendum," Judge Blumenfeld said in his 117-page decision filed . . .

True to Mr. Reynolds' position

stance, Justice Department officials have said they will oppose an appeal of the ruling. However, the department may get a chance to argue its new views in an appeal of the other housing case decided the same day.

In that case, the 6th U.S. Circuit Court of Appeals rejected Parma, Ohio's scatter-shot challenge to a 1980 ruling by U.S. District Judge Frank J. Battisti of Cleveland, who had found that the city deliberately excluded minorities in violation of the Fair Housing Act. *U.S. v. City of Parma*, 494 F. Supp. 1049.

The circuit court ruling upheld much of Judge Battisti's sweeping remedial order, which enjoined Parma from further housing discrimination, created a fair housing committee within the city government and required the city to seek more subsidized families. The court, however, reject Judge Battisti's appointment of special master to oversee implemen tion of the order — an approach hail at the time as forging an importa new tool against housing discrimin tion. (NLJ, 11-3-80.)

According to City Solicitor Andr Doyko, Parma plans to seek U. Supreme Court review of the cas which could give the Justice Depa ment an opportunity to translate M Reynolds' theory into a Supreme Cou brief.

CONSTITUTION OF THE UNITED STATES

Article III, Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article IV, Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Amendment XV, Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

UNITED STATES CODE

Title 42 United States Code

§ 3601. Declaration of policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

§ 3602. Definitions

As used in this subchapter—

(a) "Secretary" means the Secretary of Housing and Urban Development.

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(c) "Family" includes a single individual.

(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries.

(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(f) "Discriminatory housing practice" means an act that is unlawful under section 3604, 3605, 3606 of this title.

(g) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

§ 3603. Effective dates of certain prohibitions Application to certain described dwellings

(a) Subject to the provisions of subsection (b) of this section and section 3607 of this title, the prohibitions against discrimination in the sale or rental of housing set forth in section 3604 of this title shall apply:

(1) Upon enactment of this subchapter, to—

(A) dwellings owned or operated by the Federal Government;

(B) dwellings provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government, under agreements entered into after November 20, 1962, unless payment due thereon has been made in full prior to April 11, 1968;

(C) dwellings provided in whole or in part by loans insured, guaranteed, or otherwise secured by the credit of the Federal Government, under agreements entered into after November 20, 1962, unless payment thereon has been made in full prior to April 11, 1968: *Provided,* That nothing contained in subparagraphs (B) and (C) of this subsection shall be applicable to dwellings solely by virtue of the fact that they are subject to mortgages held by an FDIC or FSLIC institution; and

(D) dwellings provided by the development or the redevelopment of real property purchased, rented, or otherwise obtained from a State or local

public agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property under loan or grant contracts entered into after November 20, 1962.

(2) After December 31, 1968, to all dwellings covered by paragraph (1) and to all other dwellings except as exempted by subsection (b) of this section.

Exemptions

(b) Nothing in section 3604 of this title (other than subjection (c)) shall apply to—

(1) any single-family house sold or rented by an owner: *Provided,* That such private individual owner does not own more than three such single-family houses at any one time: *Provided further,* That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: *Provided further,* That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: *Provided further,* That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of

such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

Business of selling or renting dwellings defined

(c) For the purposes of subsection (b) of this section, a person shall be deemed to be in the business of selling or renting dwellings if—

(1) he has, within the preceding twelve months, participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein, or

(2) he has, within the preceding twelve months, participated as agent, other than in the sale of his own personal residence in providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein, or

(3) he is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families.

§ 3604. Discrimination in sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

§ 3605. Discrimination in financing of housing

After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, sex, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: *Provided*, That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section 3603(b) of this title.

§ 3606. Discrimination in provision of brokerage services

After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, or national origin.

§ 3607. Religious organization or private club exemption

Nothing in this subchapter shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin. Nor shall anything in this subchapter prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

* * * * *

§ 3612. Civil Action; Federal and State jurisdiction; complaint; limitations; continuance pending conciliation efforts; prior bona fide transactions unaffected by court orders

(a) The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred * * *

*

§ 3613. Enforcement by Attorney General; issues of general public importance; civil action; Federal jurisdiction; complaint; preventive relief

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

* * * * *

§ 3615. Effect on State laws

Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.

* * * * *

§ 3617. Interference, coercion, or intimidation; enforcement by civil action

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action.

* * * * *

§ 3619. Separability of provisions

If any provision of this subchapter or the application thereof to any person or circumstances is held invalid, the remainder of the subchapter and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

CODIFIED ORDINANCES, CITY OF PARMA, OHIO

1197.03 Parking Space Required for Apartments.

Notwithstanding the requirements set forth in Section 1197.02, the off-street parking facilities required for apartment houses shall be as follows:

(a) For an apartment house building, walk-up type, there shall be a minimum of two and one-half spaces for each dwelling unit;

(b) For an apartment house building, elevator-type, for each dwelling unit, there shall be:

(1) A minimum of three-quarters space in an enclosed garage as part of the main building or structure; and

(2) In addition thereto, a minimum of one and three-quarters spaces either in a private garage, in an open parking area on the same lot or in an enclosed underground garage beneath the main building or structure. (Ord. 95-69. Passed 9-2-69.)

1229.01 Changes in Zoning, Land Sales and Uses; Approval of Electors Required.

(a) Any amendment to, or change in, the existing zoning laws of the City, originating with the Council, shall be submitted to the Planning Commission, which shall be allowed a reasonable time, not less than thirty days, for consideration and report to Council. After such consideration and report, Council shall hold a public hearing on such proposed amendment or change, giving not less than thirty days notice of the time and place thereof, in two newspapers of general circulation within the City; and during such thirty days the next or copy of such ordinance or measure, proposed such amendment or change, and all papers pertaining thereto and the report of the Planning Commission shall be on file with the Clerk of the Council for public examination.

Any change to the existing land uses or any change whatsoever to any ordinance, or the enactment of any ordinance referring to other regulations controlling the development of land and the selling or leasing or rental of parkways, playgrounds, or other City lands or real property, or for the widening, narrowing, relocating, vacating, or changing the use of any public street, avenue, boulevard, or alley cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. In the event the City Council should approve any of the preceding changes, or enactments,

whether approved or disapproved by the Planning Commission, it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a majority vote of the electors of the City, and of each ward in which the property so changed is located, such rezoning to be voted on at the next regular Municipal election, if one shall occur not less than sixty nor more than 120 days after its passage; otherwise, at a special election falling in the generally established day of the primary election. The City Auditor shall advertise, the requested land use change in the newspaper of general circulation, whose circulation is either the largest, or second to the largest within the limits of the City for two consecutive times, with at least two weeks between notices, and a third notice one week prior to the election. The costs of such advertising shall be paid by the person requesting the change to existing land use.

CHAPTER 1528 Low Rent Housing

1528.01 Definitions.

For the purpose of this chapter:

(a) "Low rent housing project" means:

(1) Any development composed of one or more dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a State public body or authority or to which the Federal Government or a State public body or authority extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise; or

(2) Any development composed of one or more dwellings, apartments or other living accommodations for persons of low income, developed, constructed or acquired by a private individual or a nonpublic body, and to which the Federal Government will make rent supplement payments on behalf of low income families or individuals eligible for public housing.

(b) "Persons of low income" and "low income families" means persons or families who lack the amount of income which is necessary to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding, as determined by the public body or authority developing, constructing or acquiring the housing project or by the administrator of the Federal Rent Supplement Program pursuant to Federal or State laws, rules or regulations.

"Federal Rent Supplement Program" means any plan, program, law, rule or regulation of the Federal Government under which the Federal Government pays to private individuals or nonpublic bodies owning a low rent housing project, all or any part of the rent of low income families or individuals eligible for public housing.

1528.02 Approval by Electors.

No low rent housing project shall be developed, constructed or acquired in any manner in the City by any public body or authority, nor shall approval be granted for participation in the Federal Rent Supplement Program, until a majority of the qualified electors of the City voting upon such issue, approve such project or such participation by voting in favor thereof at an election to be held for that purpose or at the next primary or general election. Such election shall be provided for by resolution of Council.

1528.03 Severability.

If any sentence, clause, section or part of this chapter is found to be unconstitutional, illegal or invalid, such unconstitutionality, illegality or invalidity shall affect only such clause, sentence, section or part of this chapter and shall not affect or impair any of the remaining provisions, sentences, clauses, sections or other parts of this chapter. It is hereby declared to be the intention of the electors that this chapter would have been adopted had such unconstitutional, illegal or invalid sentence, clause, section or part thereof not been included herein.

1529.37 Maximum Height of Residential Structures.

No building designed for and occupied in whole or in part as a residence, including, but not limited to, single-family houses, dwelling houses, multiple dwellings, lodging houses, apartment houses, hotels and condominiums, shall exceed thirty-five feet in height.

COMPLAINT

(Filed April 27, 1973)

Civil Action No. C73-439

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

CITY OF PARMA, OHIO,
Defendant.

JUDGE BATTISTI

COMPLAINT

The United States of America alleges;

1. This action is brought to enjoin violations of the fair housing provisions contained in Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*

2. This Court has jurisdiction over the action under 28 U.S.C. 1345 and 42 U.S.C. 3613.

3. The defendant City of Parma is a political subdivision established and operated as a municipal corporation under Ohio law. It is located in Cuyahoga County in the Northern District of Ohio. The City is the largest suburb of the City of Cleveland, situated about eight miles southwest of that City. The defendant exercises general municipal powers, including the power to issue building permits and the power to control by zoning the use of real property within its boundaries.

4. The City of Parma has a population of approximately 100,216 persons, less than 1% of whom are black. The City of Cleveland has a population of approximately 750,903 persons, about 38% of whom are black. There is considerable racial separation in residential patterns in the Cleveland metropolitan area.

5. Section 236 of the National Housing Act, 12 U.S.C. 1715z-1, provides federal assistance to reduce amortization costs of certain rental and cooperative housing projects designed for occupancy primarily by moderate income families. The program is administered by the Federal Housing Administration (FHA), a division of the United States Department of Housing and Urban Development (HUD). Under regulations promulgated by HUD, sponsors of §236 housing are required to engage in affirmative marketing to promote equal housing opportunity.

6. It has been the policy of the defendant City of Parma to exclude black persons, on account of race, from residing within its limits in any significant numbers. Pursuant to this policy, the defendant has engaged in acts and practices which deny equal housing opportunity to black persons on account of race and color. Specifically, the City has:

(a) Prevented the construction within the City of Parma, on account of race and color, of a federally assisted apartment development which was to be built under the Section 236 program and which would have provided the opportunity for a substantial degree of desegregated occupancy;

(b) Adopted and implemented procedures which have the purpose and effect of preventing the construction of racially integrated housing for persons of low and moderate income, and of discouraging prospective sponsors of such housing from attempting to build it in Parma.

7. The conduct described in the preceding paragraphs has made housing unavailable on account of race and color in that it:

(a) Perpetuates the present all-white character of the defendant City;

(b) Denies dwellings to prospective black residents of the excluded housing on account of their race; and

(c) Denies dwellings to prospective white residents of such housing on account of the race of their black prospective fellow-residents.

8. Defendant's conduct has interfered with the right of actual and prospective sponsors of federally assisted housing to assist persons in exercising their right to equal housing opportunities.

9. Defendant's conduct constitutes a pattern or practice of resistance to the full enjoyment of the rights secured by Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*, and by the Thirteenth and Fourteenth Amendments to the United States Constitution.

10. The denial of the right to equal opportunity in housing described in this Complaint raises an issue of general public importance.

WHEREFORE, the United States prays for an order enjoining the City of Parma, its agents, officers, and employees, and all other persons in active concert or participation with any of them, from:

(a) Interfering with any person or group of persons seeking to exercise the right to equal housing opportunity without regard to race, color, religion or national origin, or the right to aid or encourage others in the exercise of those rights;

(b) Discriminating against any person or group of persons on account of race, color, religion or national origin, in the planning, development, or implementation of any program or project relating to housing;

(c) Engaging in any conduct which has the purpose or effect of perpetuating or promoting racial residential segregation; and

(d) Failing or refusing to take all necessary and appropriate steps to correct the effects of its past unlawful practices.

Plaintiff further prays for such additional relief as the interests of justice may require, together with the costs incurred in maintaining this action.

/s/ FREDERICK M. COLEMAN
United States Attorney
522-4392

/s/ RICHARD G. KLEINDIENST
Attorney General

/s/ DAVID L. NORMAN
Special Assistant Attorney General

/s/ FRANK E. SCHWELB
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Department of Justice
Washington, D. C. 20530

/s/ NORMAN P. GOLDBERG
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/s/ MICHAEL L. BARRETT
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/s/ J. STANLEY POTTINGER
Assistant Attorney General

PARMA'S AMENDED RESPONSIVE PLEADING

(Filed July 5, 1979)

Civil Action No. C73-439

(CHIEF JUDGE FRANK J. BATTISTI)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CITY OF PARMA, OHIO,
Defendant.

PARMA'S AMENDED AND SUPPLEMENTAL ANSWER TO THE COMPLAINT; COUNTERCLAIM; AND REQUEST FOR CONVENING OF A THREE-JUDGE COURT

AMENDED AND SUPPLEMENTAL ANSWER

Leave of Court having been duly obtained at the pre-trial conference on June 22, 1979, pursuant to defendant's Motion for Leave to Amend and Supplement Answer to Complaint filed June 9, 1975, defendant adds the Seventh and Eighth defenses to its answer, and also changes the year 1973 to the year 1979 in the Second Defense.

FIRST DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

Defendant denies the efficacy of and the jurisdictional allegations contained in paragraphs 1 and 2. With regard to the allegations contained in paragraph 3, defendant says that Parma is a self-sufficient community and the ninth largest city in the State of Ohio, and while sometimes referred to as a "suburb", can just as properly be denominated a "sister city" of Cleveland, the largest city in the State of Ohio, and admits the balance of the allegations in said paragraph. For want of knowledge as to the exact population statistics for Parma or Cleveland in this year of our Lord, 1979, defendant can neither admit nor deny the figures stated in paragraph 4, which were apparently based on the 1970 census, as to their correctness today, but in any event denies they are relevant or material to any issue in this case; nor can defendant respond to plaintiff's undefined characterization of "considerable racial separation" other than to allege that the residential patterns which exist in this area today are the result of the free choice of the people, as it should be, and that it is no business of government to attempt to dictate where a freedom-loving people shall live.

The allegations of paragraph 5 are conclusions of law as to which no answer is required; however if an answer is deemed necessary, those allegations are denied on the basis that the characterizations of said law and allegedly relevant regulations by plaintiff are unclear, incomplete, and misleading; that the practical effect of Section 236 is to bring immense profits to the developers of projects subsidized thereunder, and the abuses uncovered in the operation of this program has brought it under a cloud of suspicion.

Defendant denies the allegations of paragraphs 6, 7, 8, 9, and 10, and says that the residential character of the

City of Parma results from the free choice of its residents, who are of diverse national origins and religions—also purportedly protected by Sections 3601 et seq. of 42 U.S.C.—and that any attempt by the national government to interfere with the freedom of Americans to choose—without force or dictation by the national government in its various branches—their own residential patterns would be a gross violation of Constitutional rights and principles, more characteristic of a totalitarian society than of a free and open society.

Defendant further says that there is no federal legislation which purports to require local governments to accept federal aid for the creation of federally-assisted housing or which outlaws local referendums on whether the aid should be accepted; that there is no constitutional right to federally-assisted housing; that the ordinances initiated by the people of Parma providing for residential height limitation and for a referendum on whether federal aid should be accepted are neutral on their face and are not in fact aimed at any racial, ethnic, or religious minority; that provisions for initiative and referendum have long been a part of the laws of the sovereign State of Ohio under which defendant operates and demonstrates devotion to democracy, not to bias, discrimination, or prejudice; are required for such matters as approval of state constitutional amendments, the issuance of general obligation long-term bonds by municipalities, for taxes in excess of certain limitations, and for numerous other matters; that with regard to housing projects subject to referendum, the procedure ensures that all people of the community will have a voice in a decision which may lead to large expenditures of public funds for increased public services and to lower tax revenues, and gives to the people a voice in democratic decision-making that will affect the future development of their own community.

Defendant further says that the building permit for an apartment project allegedly to be financed under Section 236 was denied because the proposal failed to conform to valid requirements of the defendant's codified ordinances, applicable to all buildings whether federally or conventionally financed, and the promoter of the project failed to take the appeals available to it, if it felt the denial were in fact improper.

THIRD DEFENSE

This court lacks jurisdiction over the subject matter of this action.

FOURTH DEFENSE

Plaintiff's claim is barred by its laches, and lack of clean hands whereby equitable relief cannot be granted.

FIFTH DEFENSE

Plaintiff is specifically precluded from interfering with the rights of the people to freedom of association with others of similar national origins and religious beliefs, and to their freedom of choice as to their residences, by operation of the First, Fifth, Ninth, and Tenth Amendments to the Constitution of the United States; has no Constitutional grant of authority to interfere with the operation of local units of government, under the doctrines of separation of powers, federalism, and comity; and is precluded by operation of the Fifteenth Amendment of the Constitution from seeking to deny on account of race the right of the people of Parma to vote.

SIXTH DEFENSE

Although the complaint on its face does not frontally attack the two initiated ordinances passed by the voters

of Parma in November, 1971, defendant has learned collaterally that they are under attack by plaintiff in this action. Defendant says that plaintiff has no constitutional authority to interfere in such purely local affairs; that it has no standing with respect to such an issue; that in any event any issue *vis a vis* such ordinances is not ripe for adjudication in that said ordinances have not been invoked with respect to any proposed housing project falling within the ambit of their coverage.

SEVENTH DEFENSE

The right of action set forth in the complaint did not accrue within one hundred eighty (180) days next before the commencement of this action.

EIGHTH DEFENSE

Since the complaint and answer were filed herein, final judgment has been rendered in the case of *Mahaley v. Cuyahoga Metropolitan Housing Authority* by the United States Court of Appeals for the Sixth Circuit, 500 F. 2d 1087 (6th Cir. 1974), and a petition for a writ of certiorari was denied by the United States Supreme Court on January 13, 1975. Both parties or their privies were parties therein, and the final judgment rendered therein bars recovery by plaintiff against defendant herein under the doctrines of res judicata or claim or issue preclusion.

COUNTERCLAIM

Defendant, City of Parma, is the ninth largest city in the sovereign State of Ohio and is composed of residents whose natural origins are predominantly German, Irish, Italian, and the various Slavic peoples, and whose religion for the most part is Catholic. The plaintiff for several decades discriminated against such persons, es-

pecially those of Italian and Slavic national origins, whose antecedents originated in Eastern Europe (Poles, Ukranians, et al.) and Southern Europe (Italians, Greeks, Sicilians, et al.), by its notorious "National Origins Quotas" Immigration Acts which had the purpose and effect of limiting the immigration of, and relegating to "second class" status, the good people of those regions. During the 1800's, plaintiff tolerated the "Know-Nothing" movement with its hatred of immigrants and Catholics. Only in the last decade were the badges and incidents of this discriminatory treatment alleviated somewhat by repeal of the notorious national origins quotas immigration laws, but otherwise there has been nothing in the way of "affirmative action" by plaintiff to relieve the effects of past discriminatory policies. To protect themselves against the bigotry which plaintiff encouraged, or at least did little by way of policy or legislation to combat, the immigrants and their descendants clustered in neighborhoods, often served by a parish church adhering to the language and customs of the people comprising its parishoners. Succeeding generations often chose to reside in areas not limited to a particular nationality but nevertheless similar in regional and religious characteristics, and as a general rule, these people zealously guard and utilize their precious right to vote. Parma is such a community. By means of this action and the selective enforcement of 42 U.S.C. §3601 et seq. against communities whose people or their antecedents were the victims of the aforesaid bigotry aided and abetted by plaintiff, and regulations apparently intended to discriminate against national origin minorities, those sections and regulations are rendered unconstitutional either *per se* or in their invidious discriminatory purpose, application, or effect, and defendant requests the convening of a three-judge court to determine the constitutionality of those sec-

tions and regulations as applied to the defendant city and its residents.

WHEREFORE, defendant prays that the complaint be dismissed; that a three-judge court be convened to declare 42 U.S.C. §3601 et seq. and the allegedly relevant regulations herein involved to be unconstitutional *per se* or as attempted to be applied to defendant city and its residents; and for an order enjoining plaintiff and any of its officers, employees, agents, or departments from interfering or attempting to interfere with defendant and its residents, and similarly situated communities, from developing by the free and unfettered choice of the people its own residential patterns without coercion, intimidation, or interference by the national government, and for the recovery of its attorneys' fees and costs incurred herein.

/s/ ANDREW BOYKO
Director of Law, City of Parma
Parma City Hall
6611 Ridge Road
Parma, Ohio 44129
886-2323

/s/ ROBERT R. SOLTIS
Special Counsel
Snow-Ridge Professional Building
5788 Ridge Road
Parma, Ohio 44129
884-4770

Attorneys for Defendant

CERTIFICATE OF SERVICE

A copy of the foregoing Amended and Supplemental Answer, Counterclaim, and Request for the Convening of a Three-Judge Court was mailed to Frank Schwelb, Attorney, Department of Justice, Washington, D.C. 20531, on July 2, 1979.

/s/ ROBERT R. SOLTIS
Attorney for Defendant

DEFENDANT'S EXHIBIT A

AFFIRMATIVE MARKETING PLAN
PARMATOWN WOODS PHASE I

Sponsor's Name and Address — *Section:* 236

Forest City Development Corp.
10800 Brookpark Road
Cleveland, Ohio 44130

Location of Project — *No. of Units:* 201

Parma, Ohio

1. *Marketing Activity*

a. Because of the location of this project, it is expected that the most likely applicants will be predominantly elderly Caucasians. Further, given the population composition of the area in which the project is to be located, it is expected that there will be a significant percentage of applicants who have a second generation, eastern European background.

b. The primary and secondary market area for this project has been described by Real Estate Research Corporation as an area generally west of the Cuyahoga River and east of Rocky River; south of Brookpark Road and north of Royalton Road. In this area there are only a small number of minority group residents at this time. Further, it is not expected that significant impact can be made in attracting minority group tenants to the proposed project with or without outreach.

The principal marketing and publicity effort for this project will be through senior citizens and church groups in the project market area. Some activity has already been undertaken to promote the project and determine demand with the help of such groups.

The project's marketing efforts will start with the contact of groups in the primary market area, and move out into the secondary market area after groups in the primary area have been contacted.

Newspapers advertising will be used. Initially, such advertising will be limited to newspapers having a general circulation in the project's market area. Other media will be used, if necessary, but it is expected at this time, that the contacts made, through the senior citizen and church groups combined with newspapers of general circulation, will be sufficient to fully rent the proposed building.

Since the project sponsor expects the building to be fully rented when construction is completed, there are no present plans for using tours as a method of finding prospective tenants.

Shortly after the building construction is started, a project rental office will be set up to take inquiries and applications from prospective tenants. This office will be at a location close to the building site, and will contain literature and application forms for the project. The office will be staffed appropriately and accept inquiries both of persons who come and call in.

c. The Equal Housing Opportunity logotype will be displayed on all project brochures, advertisements and signs. The project's Equal Housing Opportunity policies will also be displayed in the project's rental office.

d. As indicated above, it is expected that only a small number of minority people will be interested in living in the proposed project. The majority of tenants are expected to be from the ethnic groups who are prominent in the project area at this time.

2. *Professional Staff Engaged in Rental Activity*

a. The rental staff for the proposed building has not been retained. It is expected to recruit this staff from the Cleveland, Southwest Cuyahoga County area. Policies governing this recruitment are covered in the Equal Employment Opportunity statement referenced in "2c" below.

b. Staff for this project has not been retained. The policy for hiring this staff is covered in "2c" below.

c. A copy of the Equal Employment Opportunity policy of Forest City Enterprises, Inc. is attached. Forest City Enterprises, Inc. is the parent company of Forest City Development Corporation, the sponsor, and of Prudential Management, Inc., the intended Management Agent.

All employees of Forest City Enterprises, Inc. have been made aware of the attached Equal Employment Opportunity policy and staff members of Prudential Management, Inc., as well as individuals hired by Prudential Management, Inc. to manage this project will be required to read and retain this Affirmative Marketing Plan.

3. All applicants reporting to the rental office or the sponsor by the HUD/Insuring Office will be sent a letter instructing them how to apply for the project, and a brochure explaining the project and indicating its amenities. These persons will be asked to call or come into the project's rental office in order to make applications.

4. The construction sign for the project has not as yet been designed. It is expected that such a sign will be erected shortly after the building's foundation is completed. The sign will display the approved Equal Housing Opportunity logotype. When the sign is designed a facsimile of the design will be submitted to the Federal Housing Administration, Cleveland Insuring Office.

Opposition

Office - Supreme Court, U.S.
FILED
MAR 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1317

In the Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF PARMA, OHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

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Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether the Fair Housing Act of 1968 applies to official acts of municipalities.

2. Whether the district court's remedial order, predicated upon a finding that Parma had engaged in purposeful racial discrimination in violation of the Fair Housing Act, traversed constitutional limitations or was otherwise an abuse of discretion because it enjoined operation of some ordinances and required affirmative corrective actions.

3. Whether the courts below were precluded or estopped from rendering the decisions here by principles of res judicata or collateral estoppel.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1317

CITY OF PARMA, OHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's memorandum opinion (Pet. App. A40-A153) is reported at 494 F. Supp. 1049, and the remedial order (Pet. App. A154-A178) at 504 F. Supp. 913. The decision of the court of appeals (Pet. App. A1-A39) is reported at 661 F. 2d 562. The order denying the City of Parma's petition for rehearing (Pet. App. A212-A223) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1981, and petitioner's timely petition for rehearing was denied on December 10, 1981. The petition for a writ of certiorari was filed on January 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT[1]

A. The City of Parma lies immediately southwest of Cleveland, Ohio, and is its largest suburb. By 1970, the City had a population of more than 100,000 persons, most of whom moved there after World War II, taking advantage of liberal VA and FHA home loan policies (Pet. App. A51-A52). According to the 1970 census, metropolitan Cleveland had a population 16% black; most of the blacks lived on the east side of Cleveland itself. Parma had 50 black residents (*id.* at A49-A51). Expert testimony credited by the district court showed that every ethnic group except blacks could be found in every part of the Cleveland area, and the abnormal concentration of blacks could not be accounted for by choice or by economics (Pet. App. A57-A73). In addition, witnesses familiar with the real estate industry in the Cleveland area testified that the private housing market in Parma was known to be inhospitable to black brokers and home buyers (Pet. App. A53-A57).

Against this background, the petitioner took a series of official actions with the purpose and effect of excluding black persons on account of race.

1. *Rejection of the "welcome" resolution*

After passage of the federal Fair Housing Act, a councilman introduced in the Parma City Council a resolution announcing that all persons of good will were welcome to the city (Pet. App. A74-A78). The resolution failed to pass

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[1]The facts recited here are those found by the district court, which the court of appeals held (Pet. App. A14-A15) were not clearly erroneous. They are not directly contested by the petition, although petitioner has reiterated its factual contentions in its statement (Pet. 3-9). Despite this alternative recitation of the facts, petitioner presents no reason to disturb the concurrent findings of the two courts below. *Berenyi* v. *District Director, Immigration & Naturalization Service*, 385 U.S. 630, 635 (1967).

due to intense opposition from, among others, the mayor, who expressed the view that Cleveland's problems would better be left to Cleveland (Pet. App. A76-A77). This action was designed to enhance, and did have the effect of enhancing, petitioner's reputation as a place where blacks are, in fact, unwelcome (Pet. App. A78).

2. *The rejection of Parmatown Woods*

In the fall of 1971, the City government denied a building permit for construction of Parmatown Woods (Pet. App. A90-A117). The project, which initially had support from the City Planning Commission, was to be a federally-subsidized apartment building principally for senior citizens. Both citizens and officials, however, openly expressed the fear that blacks would move into the project. At an open meeting in July 1971, the City Council president said publicly that he did not want Negroes in Parma (Pet. App. A102-A103), and the mayor reassured those present that the project would not be filled by persons from the east side of Cleveland (Pet. App. A103). Similar concerns were expressed by representatives of petitioner to HUD officials (Pet. App. A104-A107). Soon after it became apparent that occupancy of the project could not be limited to senior citizens or Parma residents, the permit was denied. The court found the technical reasons offered to explain the denial not to be credible. Similar technicalities had been waived when the project in question was not to be federally subsidized (Pet. App. A107-A113).

3. *Resistance to other low-cost housing*

Petitioner has also manifested racially-motivated resistance to low-cost housing by passing exclusionary ordinances, by refusing to cooperate with the Cuyahoga Metropolitan Housing Authority ("CMHA"), and by refusing to apply for Community Development funds (which would have incurred a commitment to develop such housing).

At the time the 10-story Parmatown Woods was under consideration, Parma residents initiated and passed two ordinances by referendum. One ordinance placed a 35-foot maximum on the height of all residential buildings. The other required referendum approval for the construction or acquisition of all federally subsidized housing (Pet. App. A117-A123).[2] The height limit would preclude economical construction of the types of elevator buildings normally built to serve senior citizens. Testimony showed, moreover, that developers would be reluctant, given Parma's racial climate, to run the referendum gauntlet (Pet. App. A121-A123). In addition, petitioner has consistently rebuffed the Cuyahoga Metropolitan Housing Authority's (CMHA) efforts to interest the City in any type of public housing, "turn-key" (Pet. App. A83), or other subsidized housing (Pet. App. A79-A90). Petitioner's resistance to such housing, admittedly much needed even by Parma residents, extended to sacrificing available Community Development funds in 1975. To acquire these funds for other civic purposes, municipalities must identify low-cost housing needs and plan to meet them. Petitioner identified the need, but refused to plan to meet any of it. When the funds were denied, petitioner refused to reapply (Pet. App. A127-A135).[3]

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[2]The referendum requirement would apply to all housing the construction of which would be federally subsidized or in which rent would be subsidized (Pet. App. A235-A236). That requirement goes well beyond the "local-consent requirement" (Pet. 3) in the federal statute pertaining to conventional public housing (42 U.S.C. §1437c(e)).

[3]The district court found that two other ordinances have an inhibiting effect on construction of low-cost housing, though (as the court noted) the record does not show that they were passed with that purpose. One requires two-and-a-half parking spaces per apartment unit. The other requires referendum approval of all zoning changes (Pet. App. A123-A126).

B. The United States commenced this action in the United States District Court for the Northern District of Ohio on April 27, 1973, pursuant to Section 813 of the Fair Housing Act of 1968 (42 U.S.C. 3613).[4] The complaint alleged that petitioner had engaged in a pattern and practice of making dwellings unavailable to black persons on account of race, and had interfered with the exercise by blacks of the rights protected by the Act in violation of Sections 804(a) and 817 of the Act, 42 U.S.C. 3604(a) and 3617.[5]

The district court, after trial, made findings of fact as described in part A, above, and held that the petitioner (Pet. App. A146):

> violated the Fair Housing Act not only because it made decisions with the intent to discriminate, but also because its decisions have had significant discriminatory effects. * * * In the opinion of the Court, these

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[4]That section provides, in pertinent part:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this Act and such denial raises an issue of general public importance, he may bring a civil action * * * [and request] such preventive relief * * * as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

[5]These provisions read, in pertinent part:

> [I]t shall be unlawful—
>
> (a) To * * * make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national orgin.
>
> * * * * *
>
> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of * * * any right granted or protected by section * * * 3604 * * * of this title.

> acts clearly constitute a pattern and practice of resistance to rights secured by Sections 804(a) and 817 * * *.[6]

The district court ordered the parties to attempt to reach agreement as to a remedy (Pet. App. A149). When this proved impossible, the court entered a comprehensive remedial order based upon the recommendations of the United States and testimony adduced at a special remedial hearing (*id.* at A155-A157). The order enjoined future discrimination in general terms (*id.* at A160-A161), enjoined operation of the referendum provision for low-cost housing, and suspended application of three other ordinances as applied to subsidized housing (*id.* at A164-A166).[7] The rest of the provisions, well summarized by the court of appeals (*id.* at A11-A14), contained three main features. First, petitioner was ordered to correct its reputation for official discrimination by adopting a welcoming resolution and publicizing its change of policy.[8] Second, petitioner was ordered to undertake an educational campaign to assure that all City employees know their obligations under the Act and the decree. Finally, petitioner was ordered to create a "fair housing committee" (*id.* at A12) which would take steps to attract and permit construction of low-cost, subsidized housing. This effort was to include applying, again,

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[6]The district court also held that the United States had proved a violation under the second branch of Section 813, *i.e.*, preventing groups of persons from enjoying rights protected by the Act (Pet. App. A147).

[7]These included the 35-foot height limitation, the two-and-a-half parking space requirement, and the requirement that all zoning changes be subjected to a referendum.

[8]To the extent that the district court's order appeared to require petitioner to "advertise" the sentiments of its *residents*, the court of appeals corrected it to apply only to official City policies (Pet. App. A29).

for Community Development funds (*id.* at A11). The district court appointed a Special Master to oversee the operations of this facet of the remedial order (*id.* at A12-A14).

C. On appeal, petitioner contested "virtually every conclusion of the district court" (Pet. App. A14). The court of appeals nevertheless affirmed as to liability, although it ordered some modification in the remedial order (Pet. App. A33).[9]

The court of appeals held, in pertinent part, that (1) the Fair Housing Act applies to the activities of municipalities (Pet. App. A15-A19); (2) application of the Act to municipalities is an appropriate exercise, by Congress, of its power to enforce the Thirteenth Amendment (*id.* at A21); (3) this Court's decisions in *James* v. *Valtierra*, 402 U.S. 137 (1971), and *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), are inapposite (Pet. App. A22); and (4) the decision below is consistent with decisions in the Second Circuit on related subjects (*id.* at A23-A24)[10] and consistent with prior decisions in the Sixth Circuit (*id.* at A22).[11] In addition, the court of appeals held that the lower court's remedial order, though far reaching, was "not as

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[9]Specifically, the court of appeals clarified the advertising portion of the order (Pet. App. A29) and deleted the provision for a Special Master (Pet. App. A31-A33). It also deleted the district court's requirement that Parma plan for a minimum of 133 low-cost units per year, saying that the fair housing committee could set its own reasonable goals (Pet. App. A31).

[10]*Acevedo* v. *Nassau County, New York*, 500 F. 2d 1078 (1974), and *Citizens Committee for Faraday Wood* v. *Lindsay*, 507 F. 2d 1065 (1974), cert. denied, 421 U.S. 948 (1975).

[11]*Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, 355 F. Supp. 1257 (N.D. Ohio 1973), rev'd, 500 F. 2d 1087 (6th Cir. 1974), cert. denied, 419 U.S. 1108 (1975); *Joseph Skilken & Co.* v. *City of Toledo*, 528 F. 2d 867 (1975), vacated and remanded, 429 U.S. 1068 (1977), decision adhered to, 558 F. 2d 350 (1977), cert. denied, 434 U.S. 985 (1977).

unusual as Parma suggests" (*id.* at A28) and was, with the few exceptions noted *supra*, note 9, tailored to correct the statutory violations found (*ibid.*).

Petitioner filed a timely petition for rehearing (with a suggestion of rehearing en banc), which was denied. Judge Weick filed a dissenting opinion expressing the view that the panel decision was inconsistent with *James* v. *Valtierra*, 402 U.S. 137 (1971), and that a prior decision in the circuit bound the panel, under principles of res judicata or collateral estoppel, to find for the petitioner in this case (Pet. App. A213-A214).

ARGUMENT

1. No decision of this Court or any court of appeals casts doubt on the accepted principle that the Fair Housing Act applies to governmental acts of municipalities. As early as 1970, the Court of Appeals for the Second Circuit sustained application of the Act to a municipal action in *Kennedy Park Homes Association* v. *City of Lackawanna*, 436 F. 2d 108, and this Court denied certiorari, 401 U.S. 1010 (1971). That precedent was followed in *United States* v. *City of Black Jack*, 508 F. 2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975), in *Resident Advisory Board* v. *Rizzo*, 564 F. 2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978), and in *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights* (*"Arlington Heights II"*), 558 F. 2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978).

This construction of the Act is wholly consistent with its language and purpose.[12] In terms, Section 813 (42 U.S.C. 3613) authorizes the Attorney General to sue "any person or group of persons" believed to be engaged in a "pattern or

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[12]As the court of appeals noted (Pet. App. A16), there is little legislative history bearing directly on this question.

practice" of violating the Act, *e.g.*, by making housing unavailable because of race in violation of 42 U.S.C. 3604(a). The Act does not exempt municipal corporations from the "persons" made subject to suit, and it is the general rule that, absent express exception,[13] the term "person" will be taken to include municipalities. *Monell* v. *New York Department of Social Services*, 436 U.S. 658 (1978).[14] Finally, as the court of appeals noted (Pet. App. A19), Section 815 (42 U.S.C. 3615) reflects the congressional expectation that cities as well as private parties would be sued under the Act by declaring invalid any local law that purports to authorize or require discriminatory housing practices.

2. There is no substance to petitioner's contention that "constitutional principles" prevent application of federal law to local legislative actions (Pet. 14-15). It is true that in the absence of federal legislation, the Constitution allows localities considerable discretion to make land-use decisions. Moreover, "legislative" delegations of land-use decision-making power to the electorate will not necessarily be struck down as contrary to the Due Process or Equal Protection Clauses. *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976); *James* v. *Valtierra*, 402 U.S. 137 (1971). But the Fair Housing Act is an exercise of congressional power to enforce the Thirteenth Amendment. See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409

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[13]For example, Title VII of the Civil Rights Act of 1964, until it was amended in 1972, expressly excluded states and political subdivisions from the term "employer" in 42 U.S.C. 2000e(b).

[14]The only case in which the application of the Fair Housing Act to cities was squarely questioned was *United States* v. *City of Black Jack, supra*. That challenge was a direct result of this Court's decision in *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973), indicating that a city might *not* be a person for purposes of certain other civil rights statutes. That issue, however, was laid to rest in *Monell, supra*.

(1968). Congress has acted to prevent municipalities, as well as private parties, from imposing badges and incidents of slavery, and the courts can give force to Congress' intent. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). Petitioner cites no authority to the contrary, and makes no effort to explain or distinguish the cases in which federal courts have, in fact, enjoined local land-use decisions. See, *e.g., City of Black Jack, supra; Arlington Heights II, supra.*[15]

Petitioner also suggests that principles of federalism or "separation of powers" (Pet. 14) preclude construction of the Fair Housing Act to require a municipality to build low-cost housing. See also Pet. 17, citing *Hills* v. *Gautreaux*, 425 U.S. 284 (1976). But neither the district court nor the court of appeals in this case found an affirmative duty, in the Fair Housing Act itself, requiring the City to build low-cost housing. Both courts, following well-trodden paths, found that deliberate, racially-based actions, designed to *prevent* the building of low-cost housing, could amount to a "pattern and practice" of resistance to rights guaranteed by the Act. See, *e.g.*, Pet. App. A26. Following equally familiar lines, the district court enjoined those obstacles which petitioner had placed in the way of low-cost housing (such as the obligatory referendum), and required it to take steps to make the environment hospitable to developers. To be sure, the City enjoyed a greater degree of freedom when it was not under court decree. It cannot be, though, that a

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[15]In Part 2 of the Petition, the petitioner relies on Second Circuit decisions in claiming there is a "conflict" (Pet. 15) among the circuits on this point. See *Acevedo* v. *Nassau County, New York*, 500 F. 2d 1078 (2d Cir. 1974); *Citizens Committee for Faraday Wood* v. *Lindsay*, 507 F. 2d 1065 (2d Cir. 1974), cert. denied, 421 U.S. 948 (1975). It is in no way inconsistent with the general principles stated here, however, that on different facts, other plaintiffs were unable to show that particular actions were taken with racially discriminatory purpose and effect (Pet. App. A23-A24).

decree, as applied to a municipality, is per se "unconstitutional" because it prohibits certain actions and requires others as remedial measures. Petitioner's contention that the City was constitutionally protected either from a finding of liability or from relief in this case is wholly without a basis in law.

3. Petitioner urges (Pet. 18-19) that principles of res judicata or collateral estoppel precluded the district court in this case from reaching a decision different from that in *Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, 355 F. Supp. 1257 (N.D. Ohio 1973), rev'd, 500 F. 2d 1087 (6th Cir. 1974), cert. denied, 419 U.S. 1108 (1975). But neither the issues nor the parties in the two cases even approach the degree of identity necessary for invocation of these doctrines; in fact the decision below is entirely consistent with *Mahaley*.

Mahaley was a private suit against the Cuyahoga Metropolitan Housing Authority (CMHA) and several cities, including petitioner. The plaintiffs sought to have enjoined as unconstitutional that provision of the 1937 Housing Act that requires a cooperation agreement between a city and the appropriate Housing Authority as a condition of building public housing in the city.[16] The Department of Housing and Urban Development (HUD) was a *defendant*, defending the facial constitutionality of the provision. Having prevailed on that point in the district court, HUD did not participate in the appeal. Ultimately, a divided panel of the court of appeals, reversing the district court, held that no claim was stated under 42 U.S.C. 1983 for a city's failure to sign a cooperation agreement with CMHA.[17]

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[16]The provision, referred to in *Mahaley* as 42 U.S.C. (1970 ed.) 1415, now appears at 42 U.S.C. 1437c(e).

[17]The court below concluded that "*Mahaley* was a suit under the Housing Act of 1937, not the Fair Housing Act of 1968," noting that the

All this is a far cry from the instant "pattern and practice" suit, brought against the City of Parma by the United States, in which the district court found that the City had engaged in a long-standing, racially exclusionary policy, manifested by a number of different actions and refusals to act.[18]

To the extent that the petition claims simply that *Mahaley* is legally inconsistent with the instant case, it presents no reason why this Court should depart from its settled practice of refusing to concern itself with this sort of alleged inconsistency within a circuit. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). The issue was presented to the court of appeals, but a majority of the judges there apparently see no conflict needing reconciliation.

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statutory purposes of the two acts are quite dissimilar (Pet. App. A22). Judge Weick, in his dissent from the denial of rehearing en banc, disputed this conclusion (Pet. App. A214). In any event, even if the district court in *Mahaley* found a violation of the Fair Housing Act (compare 355 F. Supp. at 1259 with *id.* at 1268), the court of appeals in reversing did not discuss that Act at all (500 F. 2d 1087).

[18]Contrary to petitioner's contention (Pet. 18), the decisions below do not find the City "guilty of violating the Fair Housing Act because it [has no] public housing." To the extent that this is a correct characterization of the *Mahaley* decision in the district court, it differentiates *Mahaley* from the instant case.

More accurately, the central issue in *Mahaley* was petitioner's (and others') failure to sign the cooperation agreement required under the 1937 Housing Act, which would have enabled CMHA to build conventional public housing in the City. In the instant case, that same refusal is but one small item in a series of acts evidencing the City's racially discriminatory purpose (see Pet. App. A138). Even if the United States were collaterally estopped from utilizing that bit of evidence, it is difficult to see how that would affect the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-1317

In the Supreme Court of the United States

October Term, 1981

CITY OF PARMA, OHIO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY OF PETITIONER CITY OF PARMA, OHIO TO BRIEF FOR THE UNITED STATES

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REPLY OF PETITIONER CITY OF PARMA, OHIO TO BRIEF FOR THE UNITED STATES

Respondent's Brief Is in Effect a Confession of Error

Both by reason of its erroneous misconceptions and assertions, and its fatal omissions, the Brief For The United States In Opposition to Parma's petition for a writ of certiorari is a persuasive, though perhaps unintended, exposition not only of why certiorari should be granted but also of why the judgment of the Court of Appeals should

be summarily reversed—even without the need for further briefing and oral argument. It constitutes in practical effect, if not in form, the confession of error called for by Circuit Judge Paul C. Weick in his dissenting opinion (App. A213-21, at A221). Respondent's Brief (R. Br.) demonstrates the failure of the Attorney General's suit at the threshold: it does not present a timely, justiciable case or controversy under Article III (App. A224). Because federal courts are courts of limited jurisdiction under Article III, the jurisdictional issues inherent in this litigation are of exceptional importance.

Respondent misconceives the meaning of §813 of the Fair Housing Act, 42 U.S.C. §3613 (App. A232). The office of Attorney General is statutory, not constitutional. He may sue only upon statutory authorization. The allegation in a complaint filed by the Attorney General of a "pattern or practice" allows him to approach the threshold of federal court jurisdiction—it does not ensure his ability to cross that threshold. He must comply with the applicable statute of limitations and demonstrate by "setting forth the facts" in a timely-filed complaint that he has standing to sue in his representative capacity, on a ripe claim for relief, constituting a live and actual controversy (rather than asking for an intrusive decree on abstract, hypothetical, or contingent questions) relative to specific rights granted by the Fair Housing Act, constituting injury in fact. With respect to all of these requirements the action at bar is fatally defective.

This Action Is Time-Barred

In his Brief, the Solicitor General did not—and cannot—deny that this action was filed more than 180 days after the two events specifically mentioned in the complaint occurred (App. A239). The rejection of plans for

Parmatown Woods on November 3, 1971 (*ibid.* paragraph 6(a)) and the passage of the two initiated ordinances on November 2, 1971 (*id.*, paragraph 6(b)) predicated this action filed more than 17 months later on April 27, 1973. Respondent does not dispute Parma's contention that this action is barred by virtue of the Fair Housing Act's clearly-stated, mandatory requirement set forth in 42 U.S.C. §3612 (App. A231) that a "civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred."

Since the Attorney General has no roving commission to sue, he must strictly comply with a statute purporting to give such authority, including the time limitation for bringing suit. "The statute thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations become part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself." *United States, ex rel. Texas Portland Cement Company v. D.C. McCord,* 233 U.S. 157, 162 (1914).

District Court Should Have Dismissed This Action When It Dismissed Cornelius v. City of Parma

When the district court dismissed the plaintiffs' amended complaint in *Cornelius v. City of Parma* (App. A208) for the reasons stated in its memorandum opinion (App. A179-208), 374 F. Supp. 730 (N.D. Ohio 1974), *vacated and remanded,* 506 F.2d 1400 (6th Cir. 1974), *vacated and remanded,* 422 U.S. 1052 (1975), *remanded for dismissal,* 521 F.2d 1401 (6th Cir. 1975), *cert. denied,* 424 U.S. 955 (1976), the district court should have dismissed the Attorney General's complaint as well, for the same jurisdictional defects are as inherent in his complaint (App. A238-41) as they were in the amended complaint of

the plaintiffs in *Cornelius*, with whom the Attorney General was in privity. Dismissal was especially imperative after this Court's decision in *Warth v. Seldin*, 422 U.S. 490 (1975), which enunciated principles applicable to suits brought by the Attorney General as well as by private plaintiffs. Respondent's failure to address this issue raised by the petition for certiorari is a tacit confession of error committed in the courts below by their refusal to apply the *Warth* reasoning to this action. Incantation of the phrase "pattern or practice" does not obviate the burden the Attorney General has in common with all plaintiffs to demonstrate that there is federal court jurisdiction. 13 WRIGHT AND MILLER FEDERAL PRACTICE AND PROCEDURE §3522.

Binding Effect of Mahaley Required Reversal

Respondent's discussion (R. Br. 11) of *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 355 F. Supp. 1257 (N.D. Ohio 1973), *reversed*, 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975), is misleading, and in stating that "in fact the decision below is entirely consistent with *Mahaley*" (*ibid.*), it is Orwellian. The first count in *Mahaley* was decided by a three-judge panel which held that the federal requirement of local consent for public housing, now codified at 42 U.S.C. §1437c(e), "is constitutional both on its face and *as applied*" (emphasis added), 355 F. Supp. at 1250. However, the decision rendered by Judge Battisti as single judge, an hour later and on the same evidence, that the failure of Parma (and four other suburbs) to enter into cooperation agreements for public housing violated 42 U.S.C. §1983 and The Fair Housing Act, 42 U.S.C. §3601 *et seq.* (355 F. Supp. at 1267 and 1268) was reversed by the Court of Appeals. In this action, Judge Battisti ruled again, and in spite of having been reversed

in *Mahaley*, that Parma's not signing a cooperation agreement violated the Fair Housing Act (App. A138).

It is hardly "consistent" to have one panel reverse Judge Battisti for holding Parma violated the Act in *Mahaley*, and another panel affirm the same holding in this action. It makes the judicial process suspect in the public's view. *Mahaley* was a class-action brought "in behalf of all tenants and applicants for low-income housing" (355 F. Supp. at 1246). Since the district court previously ruled that the Attorney General did not bring this action to vindicate any rights of Forest City Enterprises (App. A205), which has not contested Parma's conduct relative to Parmatown Woods, regarding which "no live controversy presently exists" (App. A189), the Attorney General sued as representative of and is in privity with persons of the same class as were represented by the *Mahaley* plaintiffs. The binding effect of the *Mahaley* decision required the Court of Appeals to reverse, and it erred in failing to do so.

Failure of the Lower Courts to Follow This Court's Precedents Is a Form of Judicial Anarchy Demanding Reversal

In *Mahaley*, Judge Weick explicitly recognized the hierarchy of the federal court system when he wrote that "We have no discretion but . . . to follow all applicable decisions of the Supreme Court." 500 F.2d at 1094 (n.5). That panel faithfully followed the law laid down in *James v. Valtierra*, 402 U.S. 137 (1971). That case as well as *Warth v. Seldin*, 422 U.S. 490 (1975), *Rizzo v. Goode*, 423 U.S. 362 (1976); *Hills v. Gautreaux*, 425 U.S. 284 (1976), and *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), all cases which Parma relied on below, required the Court of Appeals to reverse the district court for itself refusing to follow those precedents (as well as binding precedents of other panels of the court below).

In *Hutto v. Davis*, ... U.S. ....., 102 S. Ct. 703 (1982), this Court recognized governmental action which is "properly within the province of legislatures, not courts", and pointedly stated that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." 102 S. Ct. at 705.

Zoning matters have been historically recognized to be legislative not judicial in nature, and a local not federal concern. Municipal functions are to be performed by locally elected officials, not unelected, lifetime judges. When a district court fails to follow precedents of this Court which constitute the "supreme law of the land", *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), that court's decree can indeed be per se "unconstitutional", contrary to Respondent's assertion (R. Br. 10-11). This has been amply demonstrated, briefly in Parma's petition, and more fully in the three amicus curiae briefs filed in support of Parma's petition.

Another sort of anarchy will result if the judgment is not reversed. There will be no height limitation on low and moderate income housing in Parma (App. A165), irrespective of the city's ability to provide fire protection. In view of the wide-ranging injunction against "interfering" with providers of housing for others (App. A161), enforcement of health, safety, and building ordinances will be impaired lest enforcing them be asserted to be violations of the overbroad injunction on the same flimsy kind of evidence predicating the intrusive decree entered.

We have a government of limited powers, and those limits pertain to the Courts as well as to Congress and the Executive. *Holtzman v. Schlesinger*, 414 U.S. 1304, 1315 (1973) (Justice Marshall).

Not only does it exceed constitutional jurisdictional limitations for a district judge to rule against a 2½-parking-spaces-per-apartment-unit ordinance, when no landowner is contesting the regulation and the Attorney General has no standing to do so, it intrudes into the line-drawing function within the province of legislators. Streets clogged with parked cars are typical of slum areas, impede safety vehicles and endanger children. Because people have low income is no reason to increase their hazards to profit the builders of low-income housing. Tarnishing of judicial halos is another consequence of arrogating power rightfully entrusted to the legislative process.

There Is No Right to Public Housing nor Any Duty to Supply It

Respondent touches on the fatally-flawed reasoning of the courts below when it states that "neither the district court nor the Court of Appeals found an affirmative duty, in the Fair Housing Act itself, requiring the City to build low-cost housing" (R. Br. 10). This Court has specifically held that for liability to attach under that Act there must be a right/duty relationship. *Curtis v. Loether*, 415 U.S. 189 (1974).

Nowhere in the rambling, lengthy opinion of the district court and cursory affirmance by the Court of Appeals is there found any basis for the implied duty to supply public or low-rent housing to persons of low income. They are not a protected class named in the Act. There is no constitutional right to housing. It is not a fundamental right nor found in the penumbra of any constitutional provision. Even when the Constitution guarantees a right, such as freedom of speech, no duty is imposed upon a city to build an auditorium to facilitate the making of speeches. Nor would such a duty arise even if a district

court would assert (or even be able to infer) that the city council turned down federal funding to help build one because some councilpersons feared blacks would avail themselves of the facility. Nor would a federal judge be authorized to strike down an ordinance punishing stealing merely because council felt it would impact more on blacks than whites, for there is no right to steal.

Thus, it is not necessary in this Brief to do more than advert to the self-evident fact that there is no substantial evidence to justify the assertions—they do not deserve the appellation "inferences"—of discriminatory purpose or intent made by the district court. Clear and convincing evidence is necessary to overcome the presumption of validity inherent in municipal legislation and activities, in suits for mandatory injunctions.

There is no duty on the part of Parma to provide housing to persons of low income because no right to such housing exists. The district court "does not believe low-income housing should be equated to blacks" (App. A90). Indeed it should not be. Therefore, even if it could be said that Parma prevented low-income housing from being built, there would be no "discrimination" involved. The low-income persons in Parma are predominantly "white". They have not clamored for public housing. Thus, the assertion of deific power by the district judge to search the minds of the voters who passed the initiated ordinances, in the absence of any evidence whatsoever to link them to a discriminatory motive, amounts to more than a calumny of good hard-working people who take their right to vote seriously. He "tarred and feathered the entire population" (App. A214) for no purpose, because *Valtierra* constituted constitutional authority to participate in referendums, and there is nothing in the Fair Housing Act which purports to or could take away that right. Fur-

thermore, no referendums have ever been held, and it is entirely speculative as to how one would turn out. The time may come when the public housing authority improves to the point that public housing would be attractive to the voters. But "fencing out" from the franchise of the people of Parma because of the way they *may* vote is constitutionally impermissible. *Carrington v. Rash*, 380 U.S. 89, 94 (1965).

For the reasons stated in the Petition, the amicus curiae Briefs, and this Reply to the tacit confessions of error raised in Respondent's Brief, it is respectfully submitted that certiorari should be granted and the judgment of the Court of Appeals summarily reversed.

Respectfully submitted,

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Amicus Brief

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No. 81-1317

In the Supreme Court of the United States

October Term, 1981

CITY OF PARMA, OHIO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF GULF COAST & GREAT PLAINS LEGAL FOUNDATION, AMICUS CURIAE, IN SUPPORT OF PETITIONER

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CONSENT OF PARTIES

All parties have consented to the filing of this brief. Letters of consent have been lodged with the Court.

INTEREST OF AMICUS CURIAE

Gulf Coast & Great Plains Legal Foundation ("Foundation") is a non-profit, IRC §501(c)(3) charitable organization practicing as a public interest law firm. Its concerns include the principle of limited government and the attainment of a better balance between the national government and the states.

All litigation undertaken by the Foundation is approved by the Litigation Committee of its Board of Directors, all of whom are attorneys. The Foundation accepts no fees for its services.

Foundation's Board members live in local government units in the various parts of the United States, many of which are subject to some degree of control by Federal courts. Two Board members reside in a city in which there is now genuine reason to believe that Federal authorities are going to attempt a Parma-style "solution" to the low-income housing problem. One other Board member lives in another city having a citizens' group which had already made contact with the Foundation with respect to the possibility of proposing a referendum opting out of low-income housing altogether. As can be seen from the *Parma* holdings by the Sixth Circuit, this could be a very dangerous process indeed, if that precedent were allowed to stand and be copied nationwide.

Foundation agrees with the City of Parma that the rights of local autonomy and democratic processes are endangered by the decisions below.

REASONS FOR GRANTING THE WRIT

A Federal judge, on evidence which is inconclusive, controverted and soundly criticized by a Sixth Circuit judge, has ruled that the referendum vote of thousands of electors in a midwestern city with regard to public low-income housing must be set aside for racially discriminatory reasons.

In consequence, the judge has ordered a thoroughgoing restructuring of the rights and duties of the municipality's elected officials and those who elected them, mandating, inter alia, a considerable expenditure of city funds.

The case thus tests the following proposition:

When the citizen-electors of a city through their sacred democratic process of voting in a referendum have rejected a provision for tax supported low-income housing, is a Federal court empowered to totally reverse this determination and order the spending of tax monies for the purpose of such housing thus rendering the voters' actions a nullity.

Petitioners submit that this action by the trial judge constitutes judicial activism of such extreme magnitude as to be akin to a rape of the principles of Federalism and an emasculation of the American electoral process.

We further submit that the Court has ignored the ancient Common Law Rule "Be ye ever so high, the Law is above you." *Rex debet esse sub lege quia lex facit regem.*

In significant part it was the common man's knowledge of the patent, practical, falsehood of that adage in Eighteenth Century English Law which fomented the Revolution out of which this Republic arose.

Today, in an age of mass-media communications, terroristic violence, and assertive consciousness of individual worth, this Court owes the Nation a preservative duty to elevate that ancient maxim to truth-in-fact.

STATEMENT OF THE CASE

Amicus Curiae adopts and incorporates herein by reference the statement of the case as presented to this Court by Petitioner herein.

ARGUMENT

I

The Remedial Decree Violated Federalism's Command That Judicial Power Does Not Include the Power to Inquire Into the Wisdom, Need, Desirability or Appropriateness of Legislative or Executive Action.

In *Younger v. Harris*, 401 U.S. 37, 54, 91 S.Ct. 746, 755, 27 L.Ed.2d 669 (1971), speaking through Mr. Justice Black, this Court indicated the "absence of the factors necessary under equitable principles to justify Federal intervention". The Court gave the name "Our Federalism" to the concept of comity that was at the heart of its decision.

> "Our Federalism", Justice Black wrote, represents a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect Federal rights and Federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." 401 U.S. at 44.

The concept of "Our Federalism" also has to be taken into account when relief is sought against those in charge of an executive branch of an agency of State or local government. Such a situation occurred in *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), a case which offers instructive, compelling similarities with *Parma*, and one disturbingly significant distinction.

Contrary to the situation in *Parma* in *Rizzo* "[t]he District Court carefully and conscientiously resolved often sharply conflicting testimony, and made detailed findings of fact, which *both sides now accept* . . .". (Emphasis ours).

The facts in *Parma* were hotly contested and the findings made were conclusionary impressions not detailed findings of fact.

Similar to *Parma*, the petitioner in *Rizzo* claimed the District Judge's "judgment represented an unwarranted intrusion by the Federal Judiciary into the discretionary authority committed to them by state and local law to perform their official functions." 423 U.S. at 366.

As in *Parma*,

> [t]he central thrust of respondents' efforts . . . was to lay a foundation for equitable intervention, in one degree or another, because of an assertedly pervasive pattern of illegal and unconstitutional [conduct] by [local officials]. This misconduct was said to have been directed against minority citizens in particular.... *Id.*

In *Rizzo*, the City of Philadelphia like Parma, Ohio was charged with "conduct ranging from express authorization or encouragement of this mistreatment to failure to act in a manner so as to assure that it would not recur in the future". 423 U.S. at 367.

The concept of Federalism prevailed in *Rizzo* and this Court held it error for a lower court to issue an injunction that sharply limited a police department's latitude in the dispatch of its internal affairs in an effort to provide prophylactic procedures to minimize misconduct by a handful of state employees.

As will be detailed, *infra*, the courts below have grievously misconceived their role, and hence their powers, in the instant cause, and in wholesale proportions. That misconception, and what both the inferior courts should have considered, was the relationship between the Federal courts and the State or here, its locality.

"[T]he diverse state governments were preserved by the Framers as separate sources of authority and organs of administration . . .". (citing authority). *Lemon v. Kurtzman*, 411 U.S. 192, 207, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973).

Acting as such a "separate source of authority", Petitioner-Parma legitimately responded to the commonwealth; namely the city referendum ballot tally. Although the trial judge obviously did not agree with this response from the citizens of local municipality, it was not open to him as a representative of the Federal judiciary to inquire into the wisdom, need, desirability or appropriateness of that legislative or executive action. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 378 (1973); *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); *Laird v. Tatum*, 408 U.S. 1, 15, 92 S.Ct. 2381, 33 L.Ed.2d 154 (1972).

Seemingly foreseeing but hoping to avoid the spectre of the *Parma* holdings below, and speaking directly to the rights and duties of states and localities, this Court has said:

> We do not engage lightly in post hoc evaluation of such political judgment, founded as it is on 'one of the First principles of constitutional adjudication - the basic presumption of the constitutional validity of a duly enacted state or federal law'. (citing authority).
>
> Federalism suggests that federal court intrevention in state judicial processes be appropriately confined. (citing authority). Likewise, Federalism requires that federal injunctions *unrelated to state courts* be shaped with concern and care for the responsibilities of the executive and legislative branches of state governments (citing footnote). In short, the propriety of the relief afforded appellants by the District Court, applying familiar equitable principles, must be measured against the totality of circumstances and in light of the general principle that, absent contrary direction, state officials and those with whom they deal are entitled to rely on a *presumptively valid* state statute, *enacted in good faith* and *by no means plainly unlawful*. (Emphasis added). *Lemon, supra,* 411 U.S. at 208.

Judge Battisti's fiat ("Remedial Order"), in its all-encompassing scope, supplanted the will of the citizenry. The dictatorial, over-broad commands of the Court's order shackles the dis-established officials the voters elected, and thereby mocks the Nationhood that the Framers hoped would flow from the Constitution they drafted.

Judge Battisti's nominal but transparent attempts to do equity utterly violate this Court's mandate that an equity decree shall be "mould[ed] to the necessities", *only*, "of the particular case;" that "[f]lexibility rather than rigidity" shall distinquish it.

The court should have recognized that

> [t]he qualities of mercy and practicality have made equity the instrument for nice adjustment and

reconciliation between the public interest and private needs as well as between competing private claims (citing authorities).

In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots. *Id.*

II

The Remedial Decree Vitiated the Right of Suffrage and a Republican Form of Government Guaranteed by the Constitution by Declaring Three Ordinances Approved by the Voters of Parma to Be of "No Further Force and Effect" and by Modifying Three Other Ordinances So As to Create Specially Designated Conditions for Non-Compliance Which Also Violated Guarantees of Equal Protection.

By initiation a group of Parma citizens placed on the ballot an ordinance providing for referendums on issues involving public housing. An ordinance of a similar nature was reviewed by the Supreme Court in *James v. Valtierra,* 402 U.S. 137 (1971) and found to be a valid "procedure for democratic decision making" which "ensures that all the people of the community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues." Ignoring this endorsement of the ordinance by the highest court in our land the trial judge in this case found is unconstitutional.

A second ordinance, similarly initiated by the voters of Parma, and similarly approved by the Supreme Court in *City of Eastlake v. Forest City Enterprises, Inc.,* 426

U.S. 668 (1976) provided for referendums an all zoning changes. But the approval of the voters and the Supreme Court did not suffice. The trial judge struck it down as unconstitutional.

The third ordinance vitiated by the trial judge concerned Low Income Housing. The reason assigned for its condemnation was that "it serves as a deterrent to the development of low income housing." The legitimacy of illegitimacy of the deterrence was not identified but the judge concluded its passage was "discriminatorily motivated."

Article IV, Section Four of our Constitution guarantees to every citizen a "Republican Form of Government". The test for compliance is that "the will of the people, expressed in majorities, under the proper forms of law" and that "so long as the ultimatum of decision is left to the will of the people, at the ballot box, it is essentially republican".

By proper elective procedure a majority of the citizens of Parma decided to enact legislation that had been specifically approved by our Supreme Court. The trial judge invalidated their decision and their will and in doing so violated their constitutonal right to a Republican form of government.

The Legslative will of the people of Parma was further judicially frustrated with the court's revision of those ordinances controlling height limitation, parking and zoning. Each ordinance, announced the judge, shall remain in full force and effect, but they will be held inapplicable to low or moderate income housing. Recognition was made of the legitimate concern of the city in enacting legislation in these traditional areas of municipal control. But these concerns for health, welfare, safety and esthetics were subordinated to the judge's obsession to change the demo-

graphics of Parma. How can the esthetics of a high rise building be differentiated on the basis of the salary range of its occupants? How can the effect on traffic control be distinguished on the basis that the parking spaces are filled with Pintos instead of Porsches? And how can non-compliance with a legitimate zoning restriction be explained on the basis that the socio-economic identity of the users somehow ameliorates the need for orderly growth and control? All considerations of equal protection under the law were ignored and the initial ordinances, designed to affect the citizens of Parma indiscriminately, became special legislation applicable only to those who bore the label of "upper income". The American ideal of fairness is the basis of our "equal protection" clause in the 14th Amendment, and when fair treatment is denied because of economic status alone the constitutional guarantee is violated. *Bolling v. Sharp,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

III

The Remedial Decree Transcended the Power of the Judiciary by Mandating Legislative and Executive Action That Was Repugnant to the Citizenry of Parma.

The Judge in this case has clearly usurped the legislative function. He has presented a comprehensive package which would do the following:

First, in the administrative framework, he directs that the city of Parma:

1. Establish a Fair Housing Committee.
2. Establish a Housing Authority or (in a show of patriarchal leniency) sign a legislative pact with C.M.H.A.

Then, he identifies the following goals:

1. Develop a program to use Section 8 housing.
2. Submit a Community Development Block Grant application.
3. Develop plans for low or moderate income residential development.
4. Ensure at least 133 units annually of low and moderate income housing.
5. Develop a fair housing educational program.
6. Undertake a comprehensive advertising campaign.

Next, the persons who are to serve as implementers are identified:

> Parma citizens "collectively knowledgeable in the fields of fair housing, real estate, housing development, planning and federal housing programs" and others "who are sincerely interested in working to promote the purposes of this Order."

And, next, the court sets forth the manner of accomplishment of these goals:

> Attendance is mandated for all officials and involved employees in educational programs. Two hundred "clear and legible" copies "of my Remedial Order" are to be made freely available to anyone.

Obviously, the trial judge ignored the writings of those who conceived our Republic.

> The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove anything, would

> prove that there ought to be no judges distinct from that body. "The Federalist Papers, Number 78."

Further, the court evidenced no sense of history as revealed by Judge Irving Kaufman as he wrote:

> Students of constitutional history are agreed that one of the primary factors which motivated the authors of our Constitution was the fear of unchecked power in the institutions which they created. It is clear, moreover, that this apprehension was not directed against the legislative branch alone. Unlimited judicial power was to be guarded against, and this meant, among other things, that the judiciary was to be precluded from participating in the legislative process. *Turpin v. Mailet, et al.*, 579 F.2d 152 (2d Cir. 1978).

And then there appears a litany of legal maxims unknown to or ignored by the trial judge.

> "It is the duty of a judge to administer, not to make laws." "Though in many countries everything is left in the breast of the Judge to determine, yet with us he is only to declare and pronounce, not make or new-model the law." "We cannot make a law, we must go according to the law. That must be our role and direction."

But Judge Battisti's perceived role as judge, legislator and executive took him in a different direction. In his obsession to revamp Parma he was completely indifferent to basic constitutional principles, contemptuous of the concept of judicial restraint and cavalier in his ignorance of controlling precedents. Had he followed the language in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir., 1977) he would have recognized that his Remedial decree which required

> "defendant to appropriate money, utilize his land for a particular purpose, or take other affirmative steps toward integrated housing" was nothing more than "a massive intrusion on private autonomy." *Id.*, 1293.

Of similar import is the holding in *Dandridge v. Williams*:

> For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." (citing authority) That era long ago passed into history. (citing authority). 397 U.S. 471, 484, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

Why should the judiciary show such restraint and permit the legislature and the executive to function within their designated areas of interest? The answer is found, again, in "The Federalist Papers, Number 78":

> Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honours, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have

neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

IV

The Remedial Decree Sought to Mandate Behavior and Attitude of the Citizens of Parma and in Doing So Offended Their Constitutional Right of Freedom of Speech and Freedom of Thought.

In what would appear to be one last paroxysm of judicial activisim and excess, the court ordered a reformation of the minds and souls of the citizens of Parma. The free will of the citizenry was to be bent to the desire of the judge. Their God given right to be wrong was to be denied them. Unlike a freedom loving God which presented Adam and Eve the gift of choice, Judge Battisti's order would fashion his Eden so that nothing could go amiss.

If the order is sustained the citizens of Parma must humbly wash their faces, don their party attire, march in lock step to the foot stool of the sovereign and with smiling faces and benign manner swear fealty to the concept of open housing and mouth in unison that "all persons are welcome in Parma" and concluded with a mass mea culpa that "discriminatory practices which have characterized Parma in the past no longer reflect the attitude of the City and its citizens."

Thus, the court would ascribe to itself some higher than mortal power in its dictation of a recitation of personal conviction and belief. How is it possible in a free society that a court by judicial fiat can alter attitudes and purify souls? The courts attempt to do so is as vain as that of King Canute to sweep back the sea. But it is not only the presumptuous vanity of the court which offends the rights

of the citizens of Parma and all citizens everywhere, it is the illegality of this decree.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matter of opinion or force citizens to confess by work or act their faith therein" *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943).

Apparently, there were some doubts, even within the breast of the judge. He admits the fruitlessness of his edict by recognizing that "only with strong and sincere efforts of Parma in carrying out the terms of this Order will Parma become an open community", and that the "City of Parma must dedicate itself to carrying out the spirit as well as the letter of this remedy."

The role he plays has run full cycle, from that of a scolding patriarch, to an impatient tyrant and then to the imploring football coach.

CONCLUSION

If this petitioner's condemnation of the Remedial Decree has seemed extreme then let it be noted that "extremism in the defense of liberties is no vice". The sweeping order of this Judge violates almost every right and freedom possessed by the citizens of Parma. It defies the nicety of academic constitutional constructions. It provokes emotions that transcend traditional legal reasoning. It is, in a word, outrageous.

We respectfully urge that this Court accept this case for review and reassert those basic rights which the trial judge's decree and the lower court's decision have shockingly denied the citizens of Parma. To fail to do so could incite consequences such as this Republic never before has

faced. If allowed to stand, would any free spirited citizens of Parma acquiesce in the tyrannical demands of the decree? We submit many would respond, as did President Jackson, and challenge the judge with a contemptuous, he "made his decision. Now let him enforce it". And what then?

The tranquility of our society depends upon a passive acceptance of the rule of law. The Court speaks and we comply - but only because the Court speaks within its delegated power. That is when the decrees flow "ex cathedra". But decrees which bear no mantle of legitimate authority are written on the wind - and they sow a whirlwind. For each attempt by the judiciary to usurp power that is not theirs weakens the trust that must reside in our courts if our form of government is to prevail.

The decree issued by the trial judge bears the same seeds of destruction as did the excesses of Louis XIV. Petitioners pray the court to reverse Judge Battisti so that he may not boast "Apres moi, deluge".

The questions presented in this case are basic to maintenance of our democratic freedoms and are clearly substantial. This Court should grant Parma's writ of Certiorari.

Respectfully submitted,

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I hereby certify that a copy of the above and foregoing was mailed, postage prepaid, this 15th day of February, 1982 to:

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OCTOBER TERM, 1981

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V.
UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF PETITION FOR CERTIORARI

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NO. 81-1319

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

CITY OF PARMA, OHIO, PETITIONER
V.
UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

CONSENT OF PARTIES

All parties have consented to the filing of this brief. Letters of consent have been lodged with the Court.

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit Texas corporation supporting the operations of a public interest law firm. Its goals include limited government and a better balance between the national government and the States. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees.

LFA's Trustees and members live in local government units across the United States, many of them subject to some degree of control by federal courts. One LFA Board member resides and works in Hartford, Connecticut, which was the subject of

a suit by the Civil Rights Division similar to that against Parma, but which obtained a different result at trial. LFA's members and Trustees value their right to vote in local government matters, and LFA agrees with Parma that that right is threatened by the decisions below.

STATEMENT OF THE CASE

The Courts below found the City of Parma, Ohio, in violation of the Fair Housing Act, 42 U.S.C. secs. 3601 et seq. The question whether the Act was intended to apply to municipalities was raised but resolved against Parma. The evidence included the undeniable fact that few blacks reside in Parma and Parma's failure to obtain low-income housing grants. It also included a privately-made irresponsible statement of a lame-duck Parma official approximately ten years ago. The evidence is analyzed in greater depth below.

Once liability had been found, the district court entered an injunctive order that is breathtaking in its intrusiveness. The judge ordered city council members to exercise their votes in favor of an ordinance inviting "all persons" of good will to move into the City, whether the individual council members considered such a vote appropriate or not. He required an advertising campaign to be developed under his auspices, in which the City was to announce the adoption of the policies ordered by the judge. He created a "Fair Housing Committee" and an "Evaluation Committee," which are to exercise zoning and land use authority previously exercised by the City. The committees are also authorized to draft the welcoming ordinance for which council members are to vote, to plan the advertising campaign and perform other functions responsive to the judge. The order sets forth in detail the qualifications of committee members, including a requirement of personal philosophical commitment to the policies ordered by the district judge. In addition, the district judge ordered a series of reme-

dies requiring Parma to consolidate itself across district lines with other housing entities, rescinded zoning ordinances adopted by Parma's citizens as voters in response to initiatives (even though the ordinances were patterned upon laws approved by this Court), and ordered continuing future construction in Parma of a specific number of low-income housing units annually. He required the City to make federal funding requests it had previously decided against. He set up a special master with receivership powers. The special master was authorized, for example, to attend public or private meetings, to preside over any parts of any meeting that in his sole judgment pertained to the subject of the order, and to call meetings at any time. Meetings called by the special master were to take precedence over all other City business, no matter what its nature or urgency.

The Court of Appeals reversed the special master provision, modified the advertising campaign in minor respects, and deleted the specific number requirements attached to the low-income housing construction requirement. In all other respects, it affirmed. Judge Merritt dissented in part. He was concerned about the weight of evidence used to find liability; specifically, he objected to the court's use of the City's "image" or "reputation" as purported evidence of Housing Act violations, and he disagreed with compulsory advertising as an intended corrective. Rehearing en banc was denied. Judge Weick dissented from the denial, stating that there was "not an iota" of evidence of discrimination against blacks desiring to live in Parma. This observation was correct, since the only actions of the City that were in question concerned its failure to accomodate low-income housing. Judge Weick further described the district judge as having "tarred and feathered the entire population of" western Cleveland communities in this and other cases, and he urged the United States to confess error for the "unprecedented" order it had obtained.

REASONS FOR GRANTING THE WRIT

Desirable housing is not yet available to all low income persons in the United States. In a representative democracy allocating resources through a market economy, there is reason to doubt that the demand for desirable low income housing could in any event be completely or quickly satisfied. This case presents the question whether the Fair Housing Act and federal low-income housing legislation authorize the replacement of Parma's representative democracy with committees responsible to the district judge in an effort to countermand these nationally prevailing social facts for which, as Judge Weick pointed out, Parma's citizens are "not responsible."

The Housing Act applies nationwide and has been the subject of past and pending prosecutions similar to this one. The district judge's opinion indicates by implication that the injunction was written largely with assistance of drafts furnished by the Civil Rights Division. The potential application of the principles decided by the courts below is great. To ensure uniformity of construction in pending and future suits of this sort, the limits should be set by this Court.

I. HOLDING STATES AND THEIR SUBDIVISIONS LIABLE UNDER THE HOUSING ACT FOR THE CIRCUMSTANCES SHOWN BY THE EVIDENCE IN THIS RECORD PRESENTS SUBSTANTIAL QUESTIONS.

A. The Court of Appeals' observation that the legislative history is "inconclusive" is incorrect.

As Petitioner has shown, assurances were given in the Congress that the Housing Act would not have the result reached by the Court of Appeals in this case. At the time, there was

great concern over the scope of school desegretation remedies. Many members of Congress, including the vast majority who supported desegregation, believed remedial decrees were overly invasive of local interests. This sentiment was reflected in a variety of proposals to limit jurisdiction. Although deference to judicial enforcement of constitutional minima overcame such enactments, it is quite clear that Congress would not have knowingly overlaid constitutional remedies with additional legislative authority for citywide judicial decrees replacing local governments. Had there been an understanding that what has happened to Parma was indeed authorized by the legislation, the Housing Act would simply never have passed.

B. Even if the Court of Appeals were correct in holding the legislative history "inconclusive," this Court's requirement of a "clear statement" of Congressional intent to override State sovereignty should preclude application of the Act in a case such as this.

In a number of cases, this Supreme Court has declared the "clear statement" doctrine: the sovereign or eleventh amendment immunity of States and their subdivisions is not to be overridden by a general enactment, applicable by its terms to private parties. Only in the event of a "clear statement" of Congressional intent should such a result be reached. *Employees v. Missouri Health Dep't*, 411 U.S. 279 (1973); *Fitzpatrick v. Bitzer*, 427 U.S. 455 (1976); *Quern v. Jordan*, 99 S. Ct. 1139 (1979). The Court of Appeals erred when it pronounced the legislative history "inconclusive" and yet held the Act applicable to "states and political subdivisions." 661 F.2d at 571-72.

There is good reason for the clear statement doctrine. Application of a law such as the Housing Act to a private party

can usually be accomplished by a crisp, unambiguous decree. But application to a State or municipality is likely to result in massive judicial disruption of local government processes or even infringement of innocent people's right to free speech or to vote. More importantly, such application denigrates the constitutional status of States and lowers their standing in the federal system. While it is clear Congress may enforce the fourteenth amendment by certain intrusions into state and local sovereignty, the clear statement doctrine is a sensible reflection of judicial reluctance to infer Congressional intent to accomplish such a result on an inconclusive record. [1]

C. The district judge adopted a highly idiosyncratic view of the evidence which, if applied nationwide, would place the majority of suburban cities in violation of the law.

Most suburban cities are disproportionately representative of one ethnic group or another. In this regard, Parma is not unique. Furthermore, the overwhelming majority of suburban communities have opposed public or low-income housing. Many citizens and local government officials are of the opinion that housing authorities tend to be corrupt and incompetent, that low income housing carries higher incidence of crime, that

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1 The Court of Appeals cited Monell v. Dep't of Social Serv., 436 U.S. 658 (1978), as authority for its holding. But Monell contains an exhaustive analysis of legislative history. It persuasively documents the conclusion that 42 U.S.C. sec. 1983—which was passed nearly a century before the Housing Act, under very different circumstances—was specifically intended by Congress to apply to municipalities. In Monell, the required "clear statement" was found. Monell is simply not authority for the Court of Appeals' holding that the Housing Act applies to "states and political subdivisions" even though the legislative history is "inconclusive."

public or low-income housing tends to be poorly maintained, and that it leads to deterioration of surrounding neighborhoods and lower land values.[2] Parma is again not unique in this regard. Fierce opposition to such housing is to be found in fully integrated and even in majority-black neighborhoods.[3]

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2 The most dramatic example of recent difficulties in controlling crime in public or low income housing has been in Chicago during the past year; the mayor of Chicago temporarily moved into a particularly embattled project and took residence there to dramatize determination that massive commitment of law enforcement resources would stem the crime problem.

In the city where this Amicus Curiae is located, during the very week this brief was prepared, the Area Manager of the United States Department of Housing and Urban Development called the local housing agency's books a "shambles." See "HUD Calls Agency Books a Shambles," HOUSTON CHRONICLE, Feb. 1, 1982, sec.1, p.1, col.1. HUD officials alleged that overspending at the local agency here was a "mindset."Agency officials "haven't been too conservative with the money they have." The problem was aggravated by recent embezzlements by employees. The agency's budget exceeded $ 14 million.Id. Houston is a city with a relatively good record of avoiding monetary corruption, for insisting on efficiency, and for good accounting, yet its metropolitan housing agency is, as Parma alleged of the Cleveland counterpart, corrupt and ineffective. As in the Cleveland area, suburban cities are reluctant to work with Houston's agency. High city officials are frequently drawn into disputes between the agency and HUD. See Id. Additionally, control of crime in Houston's public housing is not materially different from the problem dramatized in Chicago. Whatever the basis for arguing that communities should provide low income housing, concern over problems such as these cannot be racially attributed.

3 During the past year, a neighborhood in Michigan generated national news when its citizens, who happened to be majority-black, objected to the location of low-income housing in their midst. The project at issue would have housed an integrated population that would have been majority white. Black community leaders stoutly denied that race was an issue.

The invalidation of ordinances passed by the voters of Parma is particularly troublesome. The district court concluded that these ordinances, which were designed to improve the quality of construction, would have a discriminatory "effect" even though not intended to do so. But any ordinance affecting land use is likely to have such an "effect." The effect is exhibited even in ordinances or laws approved by this Court; those decisions are impliedly vitiated by the holding of the courts below.[4] Provisions regarding open space, height, materials or even safety increase the cost of construction. In turn, that increased cost inevitably has some "effect" upon the volume of low-income housing that can competitively be constructed. The focus upon effect rather than intent in the courts below would result in the invalidation of the zoning scheme of every city in America.

The only evidence that was particular to Parma is exemplified by the statement of the council president, who privately stated on one occasion that he did not want Negroes in Parma. This statement was stupid and deplorable. The council president himself so recognized. But again, it is only the details that are peculiar to Parma. It is unlikely that any suburban city can be found anywhere in America in which, of the hundreds of thousands of words spoken and written annually by various high city functionaries, an individually racially deplorable private remark cannot be found.[4a] This statement,

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4 See brief of Parma at Statement of the Case.

The district court's reasoning would penalize low-income residents, in that their housing would not conform to safety, open space, and other construction requirements generally applicable in Parma.

4a An "isolated" incident of overt de jure segregation was held not to justify interdistrict consolidation in Milliken v. Bradley, 418 U.S. 717 (1974). The council president's remark was not a segregative act, and it did not prevent the planning commission from taking favorable action on the housing project at issue.

spoken over ten years ago by an individual who was then a lame duck, and who made the remark outside any official context, should not, in the words of Judge Weick, "tar and feather the entire population of these communities." This is particularly so in view of the fact that the housing project then before the planning commission was approved without any relationship to the council president's remark—a fact to which the district judge gave no weight.

Judge Weick's conclusion that "not an iota" of evidence supported the district judge's liability findings is an accurate portrayal of the record. The evidence showed that, as individuals, blacks were able to buy homes in Parma with no more difficulty than anywhere else. The sole acts for which Parma was called into court relate to its reluctance to undertake federally funded housing. Even there, basing a finding of racial relationship to actions is far-fetched. The housing projects in question were not expected to draw large numbers of blacks, and they have in fact never drawn a single black resident in the nine year period since they were constructed in another, adjacent suburb. The district judge's finding that Parma had a "reputation" as a place where blacks would not want to live should have no evidentiary weight. The factors used by the district judge to support his findings are to be found in the vast majority of suburban cities, and there is no justification for finding Parma to be different.

II. THE REMEDIAL DECREE PRESENTS SUBSTANTIAL QUESTIONS.

A. The decree requires metropolitan consolidation for public housing purposes, in derogation of the principles set forth in Milliken v. Bradley.

In *Milliken v. Bradley*, 418 U.S. 717 (1974), this Court re-

versed a decree requiring metropolitan consolidation and interdistrict remedies for school desegregation in the absence of extraordinary circumstances. In the case at bar, the remedial decree requires interdistrict consolidation in that it (1) orders Parma to sign a cooperation agreement with the Cleveland Metropolitan Housing Authority (or, in lieu of signing, create a substitute program that will house persons on the authority's list in substantially the same manner); (2) requires Parma to "develop a program in the City aimed at the interjurisdictional use of the Section 8 existing housing program;" and (3) orders Parma to apply, in specific terms, for federal grants and use them for metropolitan housing units. Other portions of the decree, such as the required advertising campaign, are designed to emphasize the interjurisdictional nature of the relief ordered.

The conditions recognized as potentially justifying interjurisdictional consolidation in *Milliken v. Bradley* do not exist here. Furthermore, if metropolitan consolidation is to be extended to the housing market, after having been generally rejected in the school desegregation process absent extraordinary circumstances, the conditions for use of this potent device should be set by this Court.

B. The remedial decree violates such disparate constitutional provisions as the freedom of speech, the tenth amendment, and the Presidential appointment power, in addition to the principles of comity, federalism, and separation of powers noted by Petitioner.

Petitioner has noted the inconsistency of the injunctive order with comity, federalism and separation of powers. This amicus curiae agrees with Petitioner's analysis. But a decree broad enough to violate these "federalism" concerns is likely, in addition, to violate other, specific provisions of the Constitution. This decree does so.

The decree orders city council members to vote for the enactment of a purely symbolic ordinance, the general text of which is to be written under the Court's auspices, welcoming "all persons of good will" to the City. This requirement imposes a duty akin to a loyalty oath that must necessarily be accomplished by exercise of the individual votes of council members. Unlike a loyalty oath, however, this require utterance is intended to have the effect of communicating publicly beliefs that the individuals thus forced to speak may not share. The infringement of the freedom of speech is enhanced by the fact that there is no effect, other than symbolic effect, to such an ordinance; it is as close to "pure" speech as anything one is likely to find. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matter of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The quixotic and unprecedented requirement that council members cast their votes for a symbolic ordinance and have their policy stated for them in an advertising campaign structured by a court presents substantial first amendment questions.

The replacement of the City's land use functions by a Fair Housing Committee and Evaluation Committee responsible to the district judge violates the ninth and tenth amendments. The tripartite test of *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. 2352 (1981), is met: The regulation covers the "City as a City;" it addresses matters, including voting, speaking in the name of the city, and regulating land use, that are "indisputably attributes of state sovereignty;" and it "directly impairs" the City's ability "to structure integral operations in areas of traditional functions." Indeed, the actual appointment of governing individuals, and the requirement tnat they meet qualifications and pursue legislative objectives im-

posed by the district judge, is far more destructive of tenth amendment values than the wage and hour limitations struck down in *National League of Cities v. Usery*, 426 U.S. 833 (1976). If the Housing Act can fairly be interpreted to authorize this decree, the Act itself presents substantial questions of constitutionality under the tenth amendment.

The district court's appointment of committee members to exercise legislative power in Parma presents substantial questions under other constitutional provisions. This order not only violates the general separation of powers doctrine but also conflicts with the specific Presidential appointment power set forth in Art. II, sec.2, cl.2 of the Constitution. If officers created pursuant to federal law are to exercise federally authorized legislative powers in Parma, the Constitution calls for the President, and not a lone district judge, to appoint them. [5] In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Congress attempted to provide for appointment of members of the Federal Election Commission by the President pro tempore of the Senate and by the Speaker of the House. In striking down this legislation, this Court said, "We think [that] any appointee exercising significant authority pursuant to the laws of the United States is an Officer of the United States, and must, therefore, be appointed in the manner prescribed by the [Appointments Clause]." The provisions in the injunctive order for the manner of appointment, in the case at bar, are indicative of the wisdom of the constitutional mandate. For example, the decree specifies the racial and religious composition of the

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5 Ofcourse, the Congress never intended to empower the President to appoint "Fair Housing Committee"members in Parma, Ohio. But that is precisely the point; it never intended to give that authority to the district judge, and his violation of the Presidential appointment power is an indication of how far afield he has gone.

committees. Such specification is inappropriate to judicial function, and, insofar as it imposes a "Religious test" as a "Qualification to [an] Office," it violates Art. V, cl.3 of the Constitution. The further requirement that committee members philosophically agree with the district judge (they must be "sincerely interested in working to promote the purposes of this Order") embroils the district judge in political considerations inappropriate to judicial resolution.

CONCLUSION

There is no evidence to support the district judge's application of the Housing Act to Parma. There is, furthermore, no justificiation for the application of the Act to a municipality in the absence of a "clear statement" by Congress that such a result was intended. The legislative history indicates precisely the opposite intent.

The injunctive order presents even more substantial questions than the liability finding. It is unprecedented in its intrusiveness. It violates not only the principles of comity, federalism, and separation of powers argued by Petitioner, but such disparate additional constitutional doctrines as the freedom of speech, the tenth amendment, the right to vote, and the Presidential appointments clause. This violation of multiple constitutional provisions is not surprising given the nature of the order. When a district judge undertakes to replace an entire government function of a City with his own appointees, to require that City officers adopt and disseminate public statements of political philosophy, to mandate the exercise of council members' votes, and even to create a different "image" or "reputation" for the City, it is predictable that the resulting decree will conflict with not one but several of the checks upon governmentpower instituted by those who wrote the Constitution.

The decree imposed upon Parma is lacking in any sense of restraint or proportion. Racial imbalance in a suburban community under these circumstances does not justify the discontinuation of representative democracy. The questions in this case are clearly substantial. This Court should grant its writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, pursuant to Rules 28.2-28.3 of this Court, I have served three (3) copies of this brief upon all counsel of record herein, by depositing same in a United States Post Office, namely, the central post office at Houston, Texas, first class postage prepaid, prior to filing, addressed to Robert Soltis, Special Counsel, City Hall, Parma, Ohio, and Rex E. Lee, Solicitor General of the United States, Department of Justice, Washington, D.C.

Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE CITY OF PARMA, OHIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER CITY OF PARMA, OHIO

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THE CITY OF PARMA, OHIO,

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed on behalf of the more than 1600 local governments, or political subdivisions of states, that are members of the National Institute of Municipal Law Officers (NIMLO). These member local governments operate NIMLO through their chief legal officer, variously called city or county attorney, corporation counsel, city solicitor or law director and other titles, with each member local government having one vote on all actions which are

cast by the organization. This brief *amicus curiae* is signed by the chief legal officers of NIMLO members on behalf of their own local government and the chief legal officers of the members of NIMLO in their official capacity.

In those municipalities where land use and planning functions are vested in a zoning authority, local government attorneys who participate in NIMLO often are responsible for advising those authorities about the proper procedures and policies to be followed in pursuing their legislative and quasi-judicial functions. The attorneys also represent their municipalities in actions instituted against the government as a result of the implementation of zoning and land use policies and procedures. Municipal attorneys recognize that a high degree of care must be exercised to ensure that policies and procedures guaranteeing the rights of all persons are established and observed; such a degree of care is necessary both to secure a responsible government and for the protection of local taxpayers. The City of Parma, Ohio is a member of NIMLO.

Continuing federal judicial scrutiny of local land use and zoning operations such as the Court of Appeals would inaugurate herein is impractical and unwarranted. Such scrutiny would create substantial uncertainty among local zoning authorities, nationwide, with respect to the propriety of land use policies and procedures. This effect would be contrary to the public interest, and the National Institute of Municipal Law Officers suggests that such federal judicial interference with local zoning and land use functions also would be violative of the principles of federalism. Consequently, NIMLO urges reversal of the judgment rendered in this case by the United States Court of Appeals for the Sixth Circuit.

Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the clerk of this Court.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case as set forth in the Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Regulation of land use through zoning constitutes the epitome of a local governmental concern. Undeniably, zoning ordinances are legislative in nature. Federal courts have no legislative power.

There is no constitutional right to adequate housing. Provision of housing is a legislative, not judicial prerogative. Whether to apply for federal funding of housing is for local officials to decide, not within the competence of district judges to mandate.

The decisions below turn our constitutional form of government on its head and violate the plainest principles of our Federalism and the separation of powers doctrine. They represent judicial activism run amuck and invite reaction to curb federal court authority. This Court should grant review in order to explicate the necessity of judicial restraint.

I. UNDER OUR NATION'S SYSTEM OF FEDERALISM, DISTRICT COURTS HAVE NO AUTHORITY TO REGULATE ZONING OR MANDATE THAT HOUSING BE BUILT

Although the Tenth Amendment did not create the Federal system of Government - the Constitution had already done

that - it is clear that the "Tenth Amendment preserves a field of automony against federal encroachment." *Hopkins Federal Savings Ass'n v. Cleary,* 296 U.S. 315, 337 (1935). The Federal system is imbedded in the whole of the Constitution. Congress in enacting the Fair Housing Act, 42 U.S.C. §3601 *et seq.*, provided that it must be applied "within constitutional limitations."

This congressional recognition of its own constitutional limitations is consistent with this Court's declarations. In *National League of Cities v. Usery,* 426 U.S. 833, 845 (1976), this Court trenchantly stated:

> "We have repeatedly recognized that there are attributes of sovereignty which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that matter."

Congress has not granted jurisdiction to federal courts to make zoning regulations. This Court nas consistently acknowleged zoning to be a local legislative prerogrative, beginning with *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926). "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled," *Berman v. Parker,* 348 U.S. 26, 33 (1954), and within that goal "a quiet place where yards are wide, people few and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs," *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9 (1974).

Given the local legislative nature of zoning, it was clearly erroneous for the court below to affirm the assertion by an unelected district judge of authority to regulate land use in Parma at the request of the Attorney General of the United

States. "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation," *Ferguson v. Skrupa,* 372 U.S. 726, 729 (1963), for we "have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, which are elected to pass laws" (*Ferguson, supra,* 376 U.S., at 730).

The unprecedented, grossly intrusive decree supplanting control over land use in Parma by elected officials and the voters of Parma violates the interrelated doctrines of federalism and separation of powers. In determining the authority of a federal court to intrude into the sphere of activity of legislative and administrative bodies within a State, the rationale of the separation of powers doctrine applies to the "delicate issues of federal-state relationships underlying this case." *Mayor of the City of Philadelphia v. Educational Equality League,* 415 U.S. 605, 615 (1974). When the frame of reference moves from a unitary court system to a system of federal courts "representing the Nation subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief," *Rizzo v. Goode,* 423 U.S. 362, 379 (1976).

Because the court below did not even discuss, let alone apply, these important doctrines undergirding our Federal system, in the words of Judge Weick's dissent, the decision below is "clearly wrong" (*United States v. City of Parma,* No. 81-3031 (CA 6 Dec. 10, 1981).

Disregard of these principles by the lower federal courts, and intruding themselves into the areas traditionally considered to be of local concern, has created increasing calls for

action to curb the federal judiciary. See for example "Drive to Halt 'Tyranny of Judges' ", *U.S. News and World Report*, February 15, 1982, P. 33.

The petition for a writ of certiorari should be granted in this important case to enable this Court to reaffirm the wise policy of judicial self-restraint.

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